(1) 932074 MAY 27 1994

No.

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In The

Supreme Court of the United States

October Term, 1993

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS; THE CALIFORNIA STATE DEPARTMENT OF EDUCATION; THE CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA,

Petitioners,

vs.

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD JACKSON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

1. Do the parents of a handicapped child have the right to reimbursement by a public school district and the State of California for rent, food, transportation and caretaking fees incurred in connection with living at the home of grandparents while he attends a private day school program eighty miles from his own residence?

2. May an administrative hearing officer make findings based only on hearsay and unsworn testimony, thereby denying the school district minimum due process?

3. Must the Court of Appeals state upon what factual basis it relies when determining (a) that a public school program is inappropriate and (b) that a private school program is appropriate?

4. Does a hearing officer and/or the Court of Appeals have jurisdiction to order a private school, which has not been shown to receive any federal funding, to "enroll" a child it is facility?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioners Ojai Unified School District and Ventura County Superintendent of Schools; the California Special Education Hearing Office; Raymond C. Brown, Hearing Officer; the California State Department of Education; Bill Honig, in his official capacity as State Superintendent of Public Instruction, State of California; Bion Jackson; Elizabeth Jackson; and Richard Jackson.

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OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS; THE CALIFORNIA STATE DEPARTMENT OF EDUCATION; THE CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI

The Ojai Unified School District, Ventura County Superintendent of Schools, the California State Department of Education and the California State Superintendent of Public Instruction petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 4 F.3d 1467 (9th Cir. 1993). It is reprinted at pages 6a-36a of the Appendix to this Petition. The Order and Decision of the District Court are unreported and are reprinted at pages 37a-45a of the Appendix to this Petition.

STATEMENT OF JURISDICTION

The Opinion of the Ninth Circuit Court of Appeal was filed on September 15, 1993. Ojai Unified School District filed a Petition for Rehearing and a Suggestion for a Rehearing En Banc, which was denied on March 31, 1994. The spreading of the mandate of the Ninth Circuit Court of Appeals on the records of the District Court was duly noticed and occurred in open court on April 2[illegible]1994. The mandate was entered on April 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (West 1988 and Supp. 1991), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1991); and certain provisions of California law are set forth in the Appendix at 46a-57a.

STATEMENT OF THE CASE

The decision below articulates the nature and extent of the State's obligation under the IDEA to provide a free appropriate public education, which has been interpreted in this Court's decision in *Board of Educ. of the Hendrick Hudson School Dist. v. Rowley,* 458 U.S. 176 (1982); *Burlington School Committee v.*

Mass. Board of Education, 471 U.S. 359 (1985) and *Florence County School District v. Carter,* 114 S. Ct. 361 (1993).

The operative controlling statute is the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 and Supp. 1991) ("IDEA"). This Act imposes obligations on states as a condition of federal funding to aid in educating children with disabilities. States receiving federal funding are required to provide disabled children with a "free appropriate public education," 20 U.S.C. § 1412(1), which must, be provided at public expense and under public supervision and direction, meet the standards of the state educational agency, and be provided in conformity with an "Individualized Education Program" ("IEP") which is tailored to the specific needs of the child. 20 U.S.C. § 1401(a)(18). The Individualized Education Program includes a statement of:

(1) The child's "present levels of educational performance";

(2) "Annual goals, including short-term instructional objectives";

(3) "Specific educational services to be provided";

(4) "A date for initiation and anticipated duration" of services;

(5) "Needed transition services for students . . . including, when appropriate, a statement of the interagency responsibilities . . . "; and

(6) "Objective criteria and evaluation procedures" for determining whether the objectives included on IEP are being met. 20 U.S.C. § 1401(a)(20).

The procedural requirements of the IDEA mandate that each state provides "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). The parents or guardian then have an opportunity for an impartial due process hearing. The decision of the state agency in the due process hearing is reviewable in federal district court, 20 U.S.C. § 1415(e)(2).

A. Facts

Bion Jackson is a severely disabled male born on February 12, 1979. Bion is deaf and blind as a result of Rubella Syndrome.

Bion attended public school classes for the developmentally disabled in Ventura County from 1980 through 1989.

On May 31, 1989, the Ojai Unified School District and Ventura County Superintendent of Schools held an Individualized Education Program (IEP) meeting and found Bion continued to be eligible for special education and services. (Exhibit 4 of CR 44).[1] The eligibility of Bion Jackson to receive special education and services was based on his continuing handicapping conditions of deaf and blind; developmentally delayed and being multi-handicapped. (Exhibit 4 of CR 44). At the time of the IEP meeting, Bion Jackson was not ambulatory and was functioning intellectually at the age of a 6 to 18 month old baby. (CR 44 Volume IV: Page 5: Lines 9-11).

At the May 31, 1989 IEP, the Ojai Unified School District

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1. Pursuant to the case processing information for the Ninth Circuit, Section G, "CR" refers to the clerk's record. This will be followed by docket number and page number, which are separated by a colon.

offered a school placement for Bion Jackson at Penfield School in a special day class. Penfield School is a public school located in Ventura County and operated by the Office of the Ventura County Superintendent of Schools. (Exhibit 4 of CR 44). At the time of the IEP meeting, the class offered to Bion Jackson was taught by Saroulta Dala, a teacher duly cred ntialed in the State of California. (CR 44 Volume IV: Page 54: Lines 1-17).

The classroom composition in Ms. Dala's class, when it was offered to Bion Jackson, was ten (10) severely handicapped students who were functioning at or above Bion Jackson's cognitive level. (CR 44 Volume IV: Page 54: Lines 1-17; CR 44 Volume IV: Page 74: Lines 24-28; CR 44 Volume IV: Page 55: Lines 6-8).

Educators who previously worked with Bion Jackson noted that in the classroom offered to him, he would be able to receive an appropriate education. (CR 44 Testimony of Gransee, Burton, Dala, Nordin, and Carbone).

The classrooms at Penfield are adjacent to a regular education campus so that Bion and other students have the opportunity to be mainstreamed with regular education students as it becomes appropriate. (CR 44 Volume IV: Page 10: Lines 25-28).

Among the designated instructional services offered at Penfield School, are the services provided by a speech and language specialist and an orientation and mobility teacher, as well as a teacher of the deaf/blind. (Exhibit 4 of CR 44 Volume IV: Page 63: Lines 12-28).

In addition to the services provided in the special day class, Bion Jackson was offered the following designated instructional services: extended school year; the services of a deaf/blind specialist; speech and language services; and instruction from an

orientation and mobility teacher. The designated instructional services, in addition to the regular class day, totalled a minimum of six and one-half (6 1/2) hours per week of specialized intensive instruction. (Exhibit 4 of CR 44).

The class offered at Penfield School provides a safe environment for its students. (CR 44 Volume III: Page 46: Lines 1-12; Page 35: Lines 16-32; Page 36: Lines 3-4)

Jackson Respondents refused the placement offered at Penfield School and requested that the District locate and identify a non-public school program which could provide Bion with an appropriate program in a safe environment.

On November 16, 1989, an administrative hearing was held at the request of the District to determine whether further assessment should be conducted with Bion Jackson and by whom.

In January, 1990, the California School for the Blind assessed Bion Jackson pursuant to the hearing officer's decision and prepared a report of its findings.

The parties were unable to come to an agreement on the issue of placement and an administrative hearing to determine the issue of placement was heard on April 3, 4 and June 26 and 27, 1990.

In a decision dated August 14, 1990, the hearing officer found that the District was required to "identify a State certified non-public school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school."

Employees of the Ojai Unified School District and the Ventura County Superintendent of Schools attempted to locate a non-public school program which would meet each of the requirements outlined in the hearing officer decision. They were unable to locate

any program within the State of California which would comply with the hearing officer's recommendations. The hearing officer held telephone conferences on November 1, 1990 and December 18, 1990, to monitor the progress the parties had made in finding a program which would comply with his order. As reflected in hearing transcripts Volume 6 and 7 (CR 44), during the telephone conversations, witnesses were not sworn nor was any oral or written evidence proffered, accepted or entered into the record. Without taking further evidence in the matter, the hearing officer reversed his original decision and indicated that the "Foundation for the Junior Blind," a private school located in Los Angeles, California, was an appropriate program for Bion Jackson. The Foundation for the Junior Blind is located approximately eighty miles from Bion Jackson's home. The Foundation for the Junior Blind was not a party to the action.

In a supplemental decision dated January 2, 1991, the hearing officer ordered the Ojai Unified School District and the Ventura County Superintendent of Schools to enroll Bion Jackson in a day class in the Los Angeles Foundation for the Junior Blind, a private school. The hearing officer also ordered the same agencies to pay for the cost of the school enrollment, tuition fees, and transportation for that placement, as well as the cost of an additional school aide if one was needed for Bion.

The hearing officer also ordered the Ojai Unified School District and Ventura County Superintendent of Schools to reimburse the Jackson family for transportation costs between Ojai and Los Angeles, caretaker fees for Bion Jackson to be able to live in Los Angeles, rent compensation to allow Bion Jackson to live in a second residence with his grandparents in Los Angeles, and food costs.

The public agencies were ordered to reimburse Bion's grandparents for rent, caretaker's fees and mileage.

B. Judicial Proceedings

The Ojai Unified School District and Ventura County Superintendent of Schools appealed the decision of the administrative hearing officer to the United States District Court. Summary Judgment on all of the issues was granted in favor of the Ojai Unified School District and Ventura County Superintendent of Schools by the District Court and judgment was entered on September 17, 1991.

On appeal, the Court of Appeals for the Ninth Circuit accepted, in their entirety, the hearing officers factual findings concerning Bion's condition and development. The court also found that the hearing officer's finding that Penfield School was not an appropriate placement, was entitled to substantial weight. The court agreed with the hearing officer that, despite their best efforts, the public schools had not provided Bion with a minimal level of educational benefit. The court found that the evidence supported the hearing officer's determination that the proposed Penfield School placement did not constitute a free appropriate public education as required by the IDEA. The Court did not refer to any evidence in the record which would support this conclusion. As a result, the Court reversed the District Court's judgment on the issue of appropriateness of Penfield School.

The court agreed with Jacksons that the Foundation for the Junior Blind was an appropriate educational placement for Bion. As a result, the court reversed the District Court's judgment on this issue.

The court also concluded that the hearing officer's order for compensation to Bion's grandparents for rent, food costs, and caretaker fees, as well as school enrollment and tuition fees, and transportation were permissible under applicable regulations.

REASONS FOR GRANTING THE WRIT

The regulations authorize a placement in a private residential program, and provide that when such a placement is necessary it shall include "non-medical care and room and board, . . . at no cost to the parents of the child." 34 C.F.R. § 300.302 (1992).

It is undisputed that, if the Foundation for the Junior Blind had a residential placement available, the School District could have properly been found liable for the costs for his room, board, and other supportive services if the public school program was ultimately found not to be appropriate. 20 U.S.C.A. § 1401(a)(18) (West 1990). The regulations also impose on the School District a duty to provide students with special education and related services "[a]t a school or facility which meets the standards that apply to State and local educational agencies[.]" 34 C.F.R. § 300.401(a)(3)(1992). While the Ninth Circuit ordered that Bion's basic education was to be provided at the Foundation for the Junior Blind, it is clear that the other services were to be provided by Bion's grandparents and paid for with public funds. Bion's grandparents and the home in which they live do not meet any state regulatory standards to which other residential schools must adhere.

The Ninth Circuit is the only United States Court of Appeals which has held that second homes, caretaker fees, rent and food costs are legitimate costs to be borne by the public school district and state in conjunction with placement in a private day school. The Ninth Circuit has cited *Jackson v. Ojai Unified School District* as authority in a subsequent case, *Union School District v. Smith,* (9th Cir., February 1, 1994, Nos. 91-16546, 91-16595) 94 Daily Journal DAR 1276, 94 Recorder CDOS 741. The Court of Appeals interpretation provides far more than educational or educationally related services to handicapped students. The Act simply does not provide a mechanism for families of disabled pupils to be entitled

to reimbursement for living expenses. Parents of disabled pupils are not free to request placement for children at public expense in a day program regardless of the location of that program and its relationship to the residence of the student, and then request housing to facilitate such placement.

This appeal focuses on the limits of a handicapped pupil's entitlement under the IDEA. The educational program is located over eighty miles from the student's residence in Ojai, California, which necessitates the establishment of a second residence. The hearing officer and the Ninth Circuit Court of Appeals amplified and supplemented the intent and plain language of the IDEA to conclude that the State and school districts are required to reimburse the Jacksons for the expense of establishing a second dwelling in Los Angeles for Bion, caretakers to provide a second family for him and food and travel expenses. The issue raised in this matter is one of first impression and is distinguishable from *Burlington School Committee v. Department of Educ.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter,* 114 S. Ct. 361 (1993).

The Court in *Burlington, supra,* 471 U.S. at 369, required that parent placements be "proper under the Act". At issue here is whether parent second homes and payment of relatives as child caretakers by public agencies is "proper under the Act".

In providing that the public agency must pay for the roof over a disabled child's head, the court has gone well beyond the "related services" which may be required to assist a child . . . "to benefit from special education". Under the Court of Appeals decision, there is no limit to what may be considered "related services". If a second residence and payment of relatives for child caretaker fees, as well as food and transportation costs to the second residence are related services, is there anything in a child's life which could not be considered a related service? Could districts be required to

provide clothing, uniforms, medical treatment and day care? If second residences and cost to provide caretakers for the child are seen as related services, any conceivable service could be said to be needed to allow the disabled child to "benefit from his or her education".

The case is also distinguishable from *Florence County Sch. Dist. Four v. Carter,* 114 S. Ct. 361 (1993). In *Carter,* the Court held that parents could be reimbursed for an appropriate placement in a non-state certified school. Here, the ordered placement includes not only a non-state certified location, but a placement which is not even a school or an agency which provides any educational service at all. The placement, in part, is grandmother's house. Do state governments and school districts have a responsibility to pay grandmothers rent?

I.

RESIDENTIAL PLACEMENTS WERE ANTICIPATED BY CONGRESS TO BE RESIDENTIAL SCHOOLS.

Congress makes only one reference to residential placements in the IDEA and it is in the context of residential schools, not homes for relatives of handicapped pupils. In defining "free appropriate public education", Congress stated that it includes "preschool, elementary, or secondary school education in the state involved". 20 U.S.C. § 1401(a)(18). Congress defined elementary and secondary schools to include "residential schools". 20 U.S.C. §§ 1401(a)(9) and (10). In clarifying the scope of a "free appropriate public education", 34 C.F.R. Subpart C, the Secretary of Education also makes his only reference to residential placement:

> If placement in a public or private residential program is necessary to provide special

> education and related services to a child . . . the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302.

Neither Congress nor the Secretary of Education intended that school districts pay for second homes for families. The residential option was clearly limited by Congress and the Secretary of Education to residential schools or residential programs. Congress did not intend that students are to be able to move freely around the country at the expense of the public educational system and have second homes provided to them in the process.

II.

SECOND HOMES FOR THE FAMILY OF DISABLED PUPILS ARE NOT A RELATED SERVICE UNDER THE ACT.

The manner and type of "related services" that Congress included in the IDEA and that have been defined by the Secretary of Education in the Code of Federal Regulations do not include lodging for children and relatives in a second home or the payment of relatives as caretakers and providers for disabled children. Those services which are included in the Code of Federal Regulations are audiology, counseling services, early identification and assessment, medical services for determining the disability, occupational therapy, parent counseling and training, physical therapy, psychological services, recreation services, rehabilitation counseling services, school health services, social work services, speech pathology, and transportation related to the provision of education. 34 C.F.R. § 300.16.

Nowhere in the long list of "related services" is lodging

mentioned. The list of appropriate related services is extensive and among them a common thread is apparent, each of the services delineated has a direct relationship to education and each of them may be provided in the school setting, be it public or private. Lodging is clearly unlike any of the related services explicitly included by Congress.

When presented with a listing of legislative items that include, but are not limited to those specifically listed, courts will consider the like nature of other items suggested for implicit inclusion. Second homes, caretaker fees and food costs for handicapped students are not related services.

III.

THE NINTH CIRCUIT ACTED BEYOND ITS AUTHORITY AND IGNORED THE UNDERLYING RECORD WHEN IT DETERMINED THAT THE PUBLIC SCHOOL PROGRAM OFFERED BY THE OJAI UNIFIED SCHOOL DISTRICT AND THE VENTURA COUNTY SUPERINTENDENT OF SCHOOLS WAS INADEQUATE AND THAT THE PRIVATE FOUNDATION FOR THE JUNIOR BLIND COULD MEET THE EDUCATIONAL NEEDS OF THE STUDENT.

In a brief statement, the Ninth Circuit states in its decision:

> We cannot ignore, however, the substantial contrary evidence upon which the hearing officer relied.

This statement was made in support of its decision that the hearing officer's decision below was supported by a preponderance of the evidence. An examination of the evidence itself, however, indicates that the decisions that the public school program was

inappropriate and that the private school program was appropriate for the student are not supported by a preponderance of the evidence. Indeed, the conclusion that the private school placement could meet the needs of the student is not supported by any admissible, credible, non-hearsay evidence in the record. Not one individual from the Foundation for the Junior Blind testified at the administrative hearing. Not one individual testified about the programs or placements which would be available to students at the Foundation, nor was there any documentation entered as evidence to describe such services.

The Ninth Circuit bases its conclusion that the public school program was inadequate on the fact that after seven years in the public school system, the student had made little progress towards learning even the most basic skills. This conclusion completely ignores the fact that the student is functioning at the cognitive level of a 6 to 18 month old baby. (CR 44 Volume IV: Page 5: Lines 9-11). Based on this student's severe cognitive delays, it can be expected that his progress will necessarily be slow.

The inquiry under *Board of Educ. of the Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176 (1982), must be: First, has the state complied with the procedures set forth in the Act? Second, has the individualized education program developed through the Act's procedures been reasonably calculated to allow the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress, the Courts can require no more. The Ninth Circuit has confused the *Rowley* requirement of an educational program reasonably calculated to enable the child to receive education benefits, with the outcome of that plan or program. Both the hearing officer and the Ninth Circuit panel heavily weighted the information that the student was unable to walk or feed himself and is not toilet trained, and have equated that functioning level with a conclusion that the educational plan for him is inappropriate. There is no evidence on

this record to suggest that conclusion. The evidence in the record shows that Bion Jackson has made progress which is commensurate with his ability. The educational plan developed for the student was reasonably calculated to confer educational benefit, and has done so. There is no requirement under *Rowley* or the IDEA that guarantees outcomes be achieved by any student. What is required of school districts and the State is that appropriate goals and objectives are written, and that the child work towards successful completion of those goals and objectives. In this case, the student had made progress towards learning how to walk, how to feed himself, and made progress in communication skills. This is a showing of effective results and demonstrates improvement given the student's severe cognitive impairment. Looking at the abilities normally shown by a six to eighteen month old baby, those abilities do not include being toilet trained. A six month old baby does not have the cognitive ability or physical ability to be toilet trained, and most children of normal cognitive levels are not toilet trained until the age of two or older. Similarly, when language development of a six to eighteen month old baby is examined, it is clear that an individual of that age cannot communicate in complex terms. It is possible that Bion Jackson will never be able to communicate complex thoughts, not because someone has not taught him properly, but because his own cognition prevents more sophisticated language. Similarly, it is the rare six month old who can walk; it is more likely that a child will begin to walk near the age of one year. What the hearing officer and the Ninth Circuit failed to understand is that the student is already functioning near the highest level of his cognitive ability.

The Ninth Circuit erred in giving substantial weight to the hearing officer's finding that Penfield School was not an appropriate placement for Bion Jackson. The court may accord the hearing officer's findings substantial weight, but that weight should only be accorded to a finding which has been made based on credible evidence and testimony taken at the administrative

hearing. In this case, the only direct evidence taken at the administrative hearing proved the appropriateness of the Penfield School placement and the ability of the public schools to work towards accomplishment of the student's goals and objectives, thereby providing him with a free appropriate public education. There is no credible, admissible, non-hearsay evidence on the record which would indicate that Penfield is not an appropriate placement for Bion Jackson.

The Ninth Circuit's decision erroneously states that:

> The Penfield School placement, however, would offer Bion only six and one-half hours per week of specialized individualized instruction.

This statement underscores the factual error made by the Court of Appeals. Six and one-half hours per week of specialized individualized one-to-one instruction were to be provided to the student in *addition* to the individualized instruction that would be given to him by his special day class teacher. The six and one-half hours per week of specialized individualized one-to-one instruction were to be provided by a deaf blind specialist, a speech and language specialist and an orientation and mobility instructor, in addition to the seven hours per day of special day class instruction given by the classroom teacher. This is a highly intensive level of educational services. It is designed to and did, in fact, confer more than a minimal educational benefit on Bion Jackson.

Neither the hearing officer's decision, nor the Court of Appeals decision, articulates what services the Foundation for the Junior Blind could provide that could not be accomplished in the public school settings that were offered. The conclusion seems to be that "private" school is better and more desirable than "public"

school without any articulation of why the components of the private school are viewed as more favorable. No evidence exists in the record which shows the manner in which the private school would address the student's goals and objectives or how they may be superior to the offerings of the public agency. There is no evidence in the record which indicates that the personnel of the private school have any superiority in training, experience or achievement of positive results when compared to the public school personnel.

The Ninth Circuit opinion states:

> Moreover, during the administrative hearings, the School District and the Superintendent never contested the Foundation for the Junior Blind's ability to serve Bion's needs; instead, it conceded that the FJB was the only non-public school in California that could do so.

This statement is incorrect. No representative for the District ever conceded that the private placement was the only non-public school that could meet the student's needs. District administrators made inquiries about possible schools for the student. The inquiries were initial and general, not conclusory and not for the purpose of making a determination as to whether or not any of the schools investigated could meet the needs of the student. During the November, 1990 telephone conversation with the hearing officer, the school representative stated:

> Well that was . . . the only option that appeared in my search in terms of serving Bion's needs. It . . . did meet the requirements that were ordered in the fair hearing.

This statement was not a concession by a District official that the

FJB was an appropriate placement. It was a statement indicating that the placement appeared to meet the hearing officer's requirements. The comment made by the school administrator was not admissible as evidence as he was not a witness in the administrative hearing. The individual had never seen the Foundation for the Junior Blind, nor did he have any direct knowledge that the Foundation for the Junior Blind could or would meet the student's needs.

The Court of Appeals decision also states that it disagrees with the school official's conclusion that the State "experts" who recommended the Foundation for the Junior Blind were not sufficiently familiar with Bion Jackson's needs to be able to render a valid opinion. The court, however, gives no basis for this disagreement. The record contains no information that any of the individuals contacted regarding placement had ever seen the student or his records, spoken with his teachers, or had any familiarity whatsoever with the student as an individual. There is nothing on the face of the record which indicates that any of the "experts" had ever seen the Foundation for the Junior Blind or had any knowledge of what services could be provided by it.

Now that the School District has been ordered to "enroll" Bion Jackson in the Foundation for the Junior Blind, how is this to be accomplished? The Foundation was not a party to the action. Nothing in the record indicates that the Foundation for the Junior Blind can or will ever accept Bion Jackson. The Foundation for the Junior Blind is a private, non-governmental, for profit agency which makes its own determinations of its clientele and sets its own standards for admittance. The record below bears no information whatsoever as to whether the Foundation for the Junior Blind would accept Bion Jackson into its day program, its residential program, or any other program. Subsequent to the decision in the Court of Appeals, when inquiries to the Foundation were made, the District administrators were informed that the

school was full and that Bion did not meet the eligibility criteria for entrance. It was incumbent upon the student's family to present evidence at the hearing level and the District Court level that the private school would and could accept the student at any given period of time. No such evidence was presented.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: June 24, 1994

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 25, 1994

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-56361
CT/AG#: CV-90-4915-R

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS

Plaintiff-Appellee

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD W. JACKSON

Defendants-Appellants

and

CALIFORNIA SPECIAL EDUCATION HEARING OFFICE, RAYMOND C. BROWN; CALIFORNIA STATE DEPT. OF EDUCATION; BILL HONIG; STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; STATE OF CALIFORNIA

Defendant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

Appendix A

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED

Filed and entered September 15, 1993.

costs taxed

LODGED
APR 11 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY s/ illegible DEPUTY

APPENDIX B — NOTICE OF HEARING OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED APRIL 14, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER CV 90-4915-R

OJAI UNIFIED SCHOOL DISTRICT et al;

Plaintiff(s)

vs

BION JACKSON et al

Defendant(s)

NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS (CIVIL)

To: counsel of record

PLEASE TAKE NOTICE that the judgment of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on APRIL 25, 1994 at 11:00 a.m. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 8, United States Courthouse, 312 N. Spring Street, Los Angeles, California. It will be necessary for all counsel to be present at that time.

CLERK, U.S. DISTRICT COURT
Dated: April 14, 1994 By: s/ William Horrell
William Horrell
Deputy Clerk

NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS Civ 42(11/76)

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 31, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 91-56361
DC No. CV-90-4915-R

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS,

Plaintiffs-Appellees,

v.

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD W. JACKSON,

Defendants-Appellants,

CALIFORNIA SPECIAL EDUCATION HEARING OFFICE, RAYMOND C. BROWN; CALIFORNIA STATE DEPT. OF EDUCATION; BILL HONIG; STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; STATE OF CALIFORNIA,

Defendants.

BEFORE: CANBY, BOOCHEVER and THOMPSON, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

Appendix C

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 15, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-56361
D.C. No. CV-90-4915-R

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS,

Plaintiffs-Appellees,

v.

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD W. JACKSON,

Defendants-Appellants,

CALIFORNIA SPECIAL EDUCATION HEARING OFFICE, RAYMOND C. BROWN; CALIFORNIA STATE DEPT. OF EDUCATION; BILL HONIG; STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; STATE OF CALIFORNIA,

Defendants.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief, Judge, Presiding

Argued and Submitted December 9, 1992 Pasadena, California
Filed: September 15, 1993

OPINION

BEFORE: CANBY, BOOCHEVER and THOMPSON, Circuit Judges

Appendix D

Opinion by Judge Canby

CANBY, Circuit Judge

This appeal involves a dispute over the appropriate educational placement for Bion Jackson under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*[1] The district court granted summary judgment in favor of the Ojai Unified School District ("School District") and the Ventura County Superintendent of Schools ("Superintendent") (collectively "the school officials"). In so doing, the district court overruled an administrative hearing officer's decision that required Bion to be placed in a private school at public expense. We reverse and remand.

I. STATUTORY FRAMEWORK

Because this appeal requires us to interpret a complex web of federal and state statutes and regulations, a brief summary of the legal framework is necessary. The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures. 20 U.S.C.A. § 1412 (West 1990 & Supp. 1993); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179-80 (1982) (describing evolution and major provisions of the act). The IDEA's primary purpose is "to assure that all children with disabilities have available to them . . .

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1. When this case was filed, the IDEA was known as the "Education of the Handicapped Act." The name of the act was changed to the "Individuals with Disabilities Education Act" effective October 1, 1990. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a), 104 Stat. 1103, 1141-42 (1990).

a free appropriate public education which emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C.A. § 1400(c) (West Supp. 1993). This purpose is achieved through the development of an individualized education program ("IEP") for each child with a disability. 20 U.S.C.A. § 1401(a)(18)(D) (West 1990). The IEP is crafted annually by a team that includes a representative of the local educational agency, the child's teacher and parents, and, in appropriate cases, the child. 20 U.S.C.A. § 1414(a)(5) (West Supp. 1993); 34 C.F.R. § 300.343(d) (1992). The IEP document must contain: information regarding the child's present levels of performance; a statement of annual goals and short-term instructional objectives; a statement of the specific educational services to be provided and the extent to which the child can participate in regular educational programs; and objective criteria for measuring the student's progress. 20 U.S.C.A. 1401(a)(20) (West Supp. 1993); 34 C.F.R. § 300.346 (1992).

In addition to these substantive provisions, the IDEA contains numerous procedural safeguards. In particular, the IDEA requires that the parents or guardians of a disabled child be notified of any proposed change in "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child," and that they be permitted to bring a complaint about "any matter relating to" such evaluation and educational placement. 20 U.S.C.A. § 1415(b)(1)(C)-(E) (West 1990). When a complaint is made, the child's parents are entitled to "an impartial due process hearing" conducted either by the state or local educational agency, or an intermediate educational unit, as determined by state law. 20 U.S.C.A. § 1415(b)(2) (West 1990). In California, the hearing is "conducted by a person knowledgeable in the laws governing special education and administrative

hearings[.]" Cal. Education Code § 56505(c) (West 1989 & Supp. 1993). After the administrative hearing officer renders a decision, "[a]ny party aggrieved by the findings and decision" has the right to bring a civil action in state or federal court. 20 U.S.C.A. § 1415(e)(2) (West 1990).

II. FACTUAL & PROCEDURAL BACKGROUND

At his birth on February 12, 1979, Bion Jackson suffered from rubella syndrome, which left him deaf and blind. Bion also was afflicted with other health problems; he remained hospitalized for the first two years of his life and spent his third year in a respite facility, where his mobility was extremely limited. As a result of these physical problems, Bion has been developmentally disabled since infancy. In 1982, Bion was adopted by Elizabeth and Richard Jackson, who live in Ojai, California. In June 1982, Mrs. Jackson met with school officials to develop an initial IEP for Bion, and he subsequently was enrolled in a day program for severely disabled students at the Boswell School, a public school located in Ventura County. Bion remained a student in the Boswell School's day program until 1989.

In April 1989, school officials notified Mrs. Jackson that the Boswell School would close at the end of the school year, and that, for the 1989-1990 school year, Bion would be reassigned to a class for disabled students at the Penfield School, another public school in Ventura County, On May 31, 1989, the Jacksons met with school officials to develop an annual IEP for Bion, and the School District reiterated its intention to place Bion in the special day class at the Penfield School.[2] The Jacksons, however, refused to send Bion to Penfield and requested instead that he be placed in a private school,

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2. The May 31, 1989 IEP document does not refer to the Penfield School. Nevertheless, it is undisputed that Penfield was the School District's proposed placement for Bion.

at the School District's expense.[3] When school officials opposed this request, the Jacksons sought mediation to determine whether the Penfield School was an appropriate placement for Bion. In September 1989, the parties submitted their dispute to a mediator but could not resolve it. Instead, as a result of the mediation, they determined that an administrative hearing was necessary and framed the issues as follows:

> 1. Has the Ojai Unified School District offered an appropriate educational program in a safe environment for Bion Jackson?
>
> 2. If not, should the District be required to identify a non-public school program which can provide Bion with an appropriate program in a safe environment and to place Bion in that program?

In November 1989, a hearing officer from the California Special Education Hearing Office ("CSEHO") held the first hearing on the case and ordered the California School for the Blind ("CSB") to conduct an independent educational assessment of Bion. The CSB conducted this assessment in January 1990 and reported that:

> Bion is lacking in any residual use of both vision and hearing. He is extremely limited in his ability to physically assess the environment. His experiences are limited to what is brought directly to him or what he is

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3. The Jacksons have continued to oppose the Penfield School placement. Therefore, while this case has been wending its way through the administrative hearings and the courts, Bion has not attended school since the summer of 1989.

> directly exposed to. Bion needs activities that are functional and meaningful to his immediate needs and capabilities. . . .
>
> Because of Bion's sensory losses, tactual and kinesthetic communication appear to be the only modes of communication that have meaning to Bion. Since educators or caregivers are required to be in physical contact, one-to-one teaching should be highly stressed. This approach could be best implemented within a program specifically designed for deaf/blind students.

The CSB assessment, however, did not lead to a resolution of the parties' dispute over whether the Penfield School was an appropriate placement for Bion. Therefore, in April and June of 1990, Raymond C. Brown, a hearing officer for the CSEHO, held additional hearings to answer the questions engendered by the mediation. In an order issued on August 14, 1990, the hearing officer found that the Penfield School was not an appropriate placement for Bion within the meaning of the IDEA. During the hearings, Mrs. Jackson had requested that Bion be placed at the Foundation for the Junior Blind ("FJB"), a private school in Los Angeles. The evidence, however, was not sufficient to allow a determination whether the FJB would be an appropriate placement. The hearing officer therefore stated that he would retain jurisdiction over the case until Bion was placed in a nonpublic school, and gave the School District and the Superintendent forty-five days "to identify a state certified nonpublic school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school."

Appendix D

On September 24, 1990, Marty Babayco, the School District's Director of Special Education, wrote to the hearing officer and reported that he had contacted several state experts, all of whom had recommended the FJB as the only nonpublic school that could serve Bion's needs. As of September 1990, however, the FJB neither had any openings in its residential program nor expected to have any during the 1990-1991 school year. Babayco further stated that he had been unable to locate any other nonpublic school that had a program suited to Bion's needs.

On November 1 and December 18, 1990, the hearing officer held two additional hearings, via telephone, to seek a resolution of this dilemma. During the first telephone hearing, the parties discussed several placements for Bion that might comply with the hearing officer's prior decision, including a day program at the FJB. The Jacksons stated that Bion's grandparents, who live approximately twenty miles from the FJB, had offered to house Bion and his caretaker if Bion were enrolled in the FJB day program. The hearing officer requested that the Jacksons present him with additional information regarding the costs associated with this option, and the parties agreed to convene another telephone hearing after the hearing officer had considered this information. At the second telephone hearing, the parties reviewed the estimated costs of the FJB day program. On January 2, 1991, the hearing officer issued a supplemental decision ordering the School District and the Superintendent to enroll Bion in the FJB's day class and to house him with his grandparents. The school officials were required to pay all costs associated with this placement including: tuition, transportation, caretaker fees, room, and board.[4]

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4. The supplemental order stated that it was effective only until the end of the 1990-1991 school year, including the extended school year. Although that school year has ended, we have jurisdiction over this appeal because "[j]udicial review

(Cont'd)

Meanwhile, on September 13, 1990, the School District and the Superintendent had filed this action in the district court challenging the hearing officer's decision that the Penfield School was not an appropriate placement for Bion. On February 11, 1991, they filed a first amended complaint challenging both the hearing officer's initial decision and the January 1991 supplemental order. On September 17, 1991, the district court rejected all of the hearing officer's conclusions and granted summary judgment in favor of the School District and the Superintendent. The Jacksons appealed the judgment.

III. AN APPROPRIATE PLACEMENT

A. District Court's Grant of Summary Judgment

The Jacksons contend that the district court erred by granting the school officials' motion for summary judgment. They argue that there are disputed issues of material fact, and that the School District and the Superintendent are not entitled to judgment as a matter of law.

Our resolution of this issue requires an explanation of the judicial review process created by the IDEA. In an action challenging an administrative decision, the IDEA provides that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the

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(Cont'd)
invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings." *Rowley*, 458 U.S. at 186-87 n.9. Therefore, because the dispute between the parties is capable of repetition yet evading review, this appeal is not moot. *See id.*

evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C.A. § 1415(e)(2) (West 1990). Thus, judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review. *See, e.g., Kerkam v. McKenzie,* 862 F.2d 884, 887 (D.C. Cir. 1988) ("the district court's authority under § 1415(e) to supplement the record below with new evidence, as well as Congress's call for a decision based on the 'preponderance of the evidence,' plainly suggests less deference than is conventional [in the review of agency actions]"); *Town of Burlington v. Department of Educ.,* 736 F.2d 773, 791 (1st Cir. 1984) ("Congress intended courts to make bounded, independent decisions — bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court"), *aff'd sub nom. Sch. Comm. v. Department of Educ.,* 471 U.S. 359 (1985). Nevertheless, when reviewing state administrative decisions, "courts must give 'due weight' to judgments of education policy[.]" *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1311 (9th Cir. 1987) (quoting *Rowley,* 458 U.S. at 206). Therefore, the IDEA does not empower courts to " 'substitute their own notions of sound educational policy for those of the school authorities which they review.' " *Gregory K.,* 811 F.2d at 1311 (quoting *Wilson v. Marana Unified Sch. Dist.,* 735 F.2d 1178, 1183 (9th Cir. 1984) (citing *Rowley,* 458 U.S. at 206)). "How *much* deference to give state educational agencies, however, is a matter for the discretion of the courts[.]" *Gregory K.,* 811 F.2d at 1311 (emphasis in original).

Here, conducting its review of the administrative proceedings with this unusual mixture of discretion and deference, the district court decided to grant the school officials' motion for summary judgment and adopt their proposed "Statement of Uncontroverted

Facts and Conclusions of Law." The district court's grant of summary judgment in this case is problematic, however, because disputed issues of material fact clearly exist.[5] The district court purported to make findings of undisputed facts, but the court actually rendered findings of fact on issues that had been disputed in the administrative hearings; these issues, moreover, had been decided adversely to the School District and the Superintendent by the hearing officer. Although this procedure is permissible under the IDEA, it is not a true summary judgment procedure. Instead, the district court essentially conducted a bench trial based on a stipulated record. Accordingly, we conclude that, because the district court already has performed a de facto bench trial, a remand for trial would serve no useful purpose in this case. The parties concede that the district court had before it all of their evidence regarding the issues in dispute; the record before us is therefore complete. Bion already has lost four years of schooling during the pendency of the administrative and judicial proceedings; we cannot sanction any additional, unnecessary delay. We therefore treat this case as having been tried to the district court on a stipulated record.[6]

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5. For example, the parties dispute: the amount of progress Bion had made during his seven years in the public school system toward attaining the goals set forth in his IEPs; whether the teacher of the class at the Penfield School was adequately qualified to teach a deaf/blind student; and whether the Penfield School could provide sufficient instructional services to meet Bion's unique educational needs.

6. We hold only that summary judgment was not appropriate in this case; we do not suggest that summary judgment could never be used in IDEA cases. *Cf. Victoria L. v. District Sch. Bd. of Lee County*, 741 F.2d 369, 372 (11th Cir. 1984) (rejecting the argument that the IDEA precludes the use of summary judgment and noting that "[n]othing in the language or legislative history of the [IDEA] suggests that Congress intended to dispense with the wholesome utility of summary judgment") (quotation omitted). We express no opinion on this issue.

Appendix D

B. Additional Evidence Presented to the District Court

Before turning to the merits of this appeal, we must first resolve a dispute over the contents of the record. The Jacksons contend that the district court erred by allowing the school officials to introduce evidence of an alternative placement that had not been considered during the administrative proceedings. We disagree.

As we already have pointed out, the IDEA provides that "the court shall receive the records of the administrative proceedings, *shall hear additional evidence at the request of a party,* and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(e)(2) (emphasis added). This court has not yet construed the scope of the statute's "additional evidence" provision. In its well-reasoned decision on this issue, the First Circuit held that:

> We construe "additional" in the ordinary sense of the word, *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed. 2d 199 (1980), to mean supplemental. Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. *Rowley,* 458 U.S. at 206, 102 S.Ct. at 3051.

* * *

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The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

* * *

The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. A practicable approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. . . . In ruling on motion for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

Town of Burlington, 736 F.2d at 790-91 (footnotes omitted).[7] We agree with the First Circuit's exposition of this statutory provision, and we adopt its standard for the admission of additional evidence in IDEA cases.

To support their motion for summary judgment, the School District and the Superintendent submitted affidavits from Marty Babayco and Diana Novak regarding the educational programs available at the DeAnza Middle School, a public school located in Ventura County.[8] This evidence was presented because nearly a year had passed since the hearing officer had rendered his initial decision, and Bion was by then older than the other students at the Penfield School. Accordingly, Babyco and Novak stated that DeAnza, which serves older students, would be an appropriate placement for Bion. Under the standard that we have now adopted, the district court has discretion to admit additional evidence "concerning relevant events occurring subsequent to the administrative hearing." *Id.* at 790. Because the evidence at issue here fits within this category, we find no error in the district court's decision to admit it.

C. The Penfield School Placement

The Jacksons argue that the district court failed to give sufficient weight to the hearing officer's findings and, in particular, to his conclusion that the Penfield School was not an appropriate educational placement for Bion. Because "[w]e review

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7. The First Circuit found no legislative history to guide its construction of the "additional evidence" provision. *Town of Burlington*, 736 F.2d at 790 n.20.

8. Novak had testified at the administrative hearings; Babayco had assisted with the presentation of the School District's case.

de novo the appropriateness of a special education placement", *Gregory K.*, 811 F.2d at 1314, "we need not consider how much weight the trial court gave or ought to have given to the administrative findings", *id.* at 1311. "Instead, we address this issue to determine how much weight we are to give the administrative findings[.]" *Id.*

In *Gregory K.*, this court adopted the First Circuit's standard for determining the degree of deference owed to the administrative findings:

> "The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole."

Id. at 1311 (quoting *Town of Burlington*, 736 F.2d at 792); *accord Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 587-88 (9th Cir. 1992). Despite their discretion to reject the administrative findings after carefully considering them, however, courts are not permitted simply to "ignore the administrative findings." *Ash*, 980 F.2d at 588; *see also Kerkam*, 862 F.2d at 887 (although courts are not required to defer to an administrative decision, "[d]eference to the hearing officer makes sense in a proceeding under the [IDEA] for the same reasons that it makes sense in the

review of any other agency action – agency expertise, the decision of the political branches (here state and federal) to vest the decision initially in the agency, and the costs imposed on all parties of having still another person redecide the matter from scratch").

Here, the administrative hearing officer heard testimony from: Elizabeth Jackson, Bion's mother; Fran Larsen, Bion's physician since 1982; David Gransee, Director of the Program for the Hearing Impaired at Camarillo State Hospital; Diana Novak, Director of Special Education for the Superintendent; Teri Norrdin, a nurse at the Boswell School; Lois Carbone, school psychologist at Boswell, and Saroulta Dala and Cathleen Burton, Bion's teachers at Boswell. Furthermore, the hearing officer considered extensive documentary evidence, which included: fourteen IEP documents covering the period from June 1982 through May 1989; numerous progress reports written by Bion's teachers at the Boswell School; health and medical information; assessments of Bion performed by the CSB in 1982 and 1990; and materials describing the educational programs offered at both the FJB and the Penfield School. After summarizing all of this evidence, the hearing officer found that:

> [A]fter seven years in the public school system in Ventura County, Bion still does not have a language, is not toilet-trained, cannot feed himself, cannot walk, and has developed very few self-help skills. These facts exist despite the diligent efforts of school district staff to educate Bion. Ms. Novak testified that no student receives more designated instruction and services than Bion.

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Our review of the administrative record reveals that the hearing officer's findings are supported by a preponderance of the evidence. Indeed, the "statement of uncontroverted facts", which was prepared by the school officials and adopted by the district court, is consistent with the hearing officer's factual findings regarding Bion's level of functioning, although it speaks in far more general terms than did the hearing officer's decision.[9] Accordingly, we accept in their entirety the hearing officer's factual findings concerning Bion's condition and development. *See Gregory K.*, 811 F.2d at 1311 (after considering the administrative record, "the court is free to accept or reject the findings in part or in whole") (quotation omitted).

The real controversy between the parties stems from the hearing officer's conclusion that the public school program had not provided Bion with the free appropriate public education required by the IDEA. "An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child. . . . The states are obliged to provide 'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.' " *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 197 n.21, 200-

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9. For example, the district court found that:

> 6. At the time of May 31, 1989 IEP meeting[,] special education and services eligibility of Bion Jackson was based on the following handicapping conditions, deaf and blind; developmental delay and multi-handicapped.
>
> 7. The eligibility for special education was based upon the facts that Bion Jackson has no vision or hearing; is not ambulatory and is functioning far below his chronological age.

01). The hearing officer applied this legal standard in reaching his decision. He stated that "[t]he first consideration pertains to 'educational benefit.' Will a placement at Penfield School meet the *Rowley* test with regard to 'benefit?' " Having thus posed the relevant question, the hearing officer concluded that:

> [D]eciding the question of educational benefit in this case is difficult in that it is not clear what Bion's learning capacity actually is. However, school district witnesses, [CSB] assessors, and Bion's mother are optimistic that some progress is possible, given the right circumstances.
>
> The evidence presented reveals that Bion has been receiving individually designed instruction and services from the district. Furthermore, school district teachers commensurate with their expertise have expended great effort to educate Bion, given his numerous handicaps.
>
> A review of the 1982 [CSB] assessment . . ., all IEPs and their supplemental documents . . ., and the 1990 [CSB] assessment . . . brings into question whether or not, in an eight-year period, Bion has received the basic level of educational benefit contemplated by state and federal laws. If not, he should not be continued in the same type of program at Penfield School. The level of benefit is difficult to ascertain in this case as there are no written grades to measure educational accomplishment, only

goals and objectives and the testimony of witnesses. Additionally, Bion is functioning at such a low level that his achievements are difficult to measure or quantify.

The IEPs . . . contain goals and objectives for each year. Although goals and objectives are not guarantees, they are targets that teachers and therapists strive to reach. In Bion's case, some of the goals have been reached; however, the most important ones have not. A review of what has *not* happened may be the best way to address the level of educational benefit thus far. Bion is now 11-years-old and still has no language, which is of paramount concern. He has for all practical purposes no way of communicating his needs. Bion's mother stated that she had never seen him sign independently; his teachers noted limited signing which they think he understands. The 1990 [CSB] assessment indicated that the assessors think Bion has the capacity to learn to sign.

Bion is not toilet-trained despite the efforts put forth by teachers and aides to develop capability over a seven-year period. Bion cannot walk unaided, although it is not clear whether this is due to fear or physical impossibility. Bion cannot feed himself without aid, and he does not indicate hunger or thirst. Bion cannot dress or undress himself unaided. Bion does not match or classify

> objects and he does not demonstrate an understanding of sequencing.
>
> The professional qualifications of Saroulta Dala, Bion's proposed special day class teacher, are a concern. Ms. Dala does not have a special education credential to teach either the blind or the deaf ([Cal.] Education Code [§] 44265.5), although her rapport with and affection for Bion are exemplary. Other credentialed teachers and therapists have made little progress with Bion. . . .
>
> In his school district placements, Bion has not benefited educationally because he has not made satisfactory progress towards his IEP goals and objectives. The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit.

The hearing officer then proceeded to the question whether the School District should "be required to identify a nonpublic school program which can provide Bion with an appropriate program in a safe environment and to place Bion in that program[.]" He concluded that:

> The evidence taken as a whole indicates that

> another approach must be taken towards educating Bion. The Hearing Officer finds that the school district must place Bion in an appropriate nonpublic school program for the 1990-1991 school year. . . . A one-year placement in another setting will also provide additional information as to whether Bion is capable of progress or has reached a plateau.

Both in the district court and on appeal, the School District and the Superintendent have argued that the hearing officer's decision is not supported by a preponderance of the evidence. They rely primarily on the testimony of Bion's teachers at the Boswell School, who stated that Bion had made progress under their tutelage. We cannot ignore, however, the substantial contrary evidence upon which the hearing officer relied. Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary. But the IDEA provides for such a decisionmaker, and we accord his rulings some deference. *See Kerkam*, 862 F.2d at 887 ("Congress's emphasis on fair procedures at the administrative level would be frustrated if courts could freely disregard the results").

Having reviewed the record of the administrative proceedings, we are persuaded that the hearing officer's finding that Penfield was not an appropriate placement for Bion is entitled to substantial weight. *See Gregory K.*, 811 F.2d at 1311 (this court independently determines how much weight to give the administrative findings on issues that it reviews de novo). We reach this conclusion for several reasons. The hearing officer's decision evinces his careful, impartial consideration of all the

evidence and demonstrates his sensitivity to the complexity of the issues presented. He recognized that it is impossible to determine conclusively the extent to which Bion is educable, and he acknowledged that Bion's lack of progress toward his IEP goals is not the result of a lack of effort by public school personnel. As the hearing officer noted, moreover, a one-year placement in another school will reveal more fully whether Bion is capable of making progress toward his IEP goals. Indeed, the outlook for Bion's educational future is not entirely bleak. The 1990 CSB assessment, which contains the most recent information about Bion, concludes that he has the capacity to learn communication and self-help skills, and that he requires a program specifically designed for deaf/blind students, in which one-to-one teaching is emphasized. The Penfield School placement, however, would offer Bion only six and one-half hours per week of specialized, individual instruction.

Bion's IEPs for the years 1982-1989 and the 1990 CSB assessment demonstrate that, after seven years in the public school system, Bion has made little, if any, progress toward learning even the most basic skills. These facts cast serious doubt on the school officials' protestations that they have provided Bion with an appropriate education. *Cf. Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the [IDEA's] beneficiaries[; h]ence, actual educational results are relevant to determining the efficacy of educators' policy choices") (footnote omitted) (quoting *Town of Burlington*, 736 F.2d at 788), *cert. denied*, 111 S.Ct. 1122 (1991). We agree with the hearing officer that, despite their best efforts, the public schools have not provided Bion with a minimum level of educational benefit. *See Rowley*, 458 U.S. at 201; *Ash*, 980 F.2d at 587; *Gregory K.*, 811 F.2d at 1314. We find that the preponderance of the evidence supports

the hearing officer's determination that the proposed Penfield School placement did not constitute a free appropriate public education as required by the IDEA. The additional evidence submitted to the district court, moreover, does not demonstrate any material difference between the instructional programs offered at Penfield and DeAnza. We find therefore that DeAnza does not constitute an appropriate educational placement for Bion. Accordingly, we reverse the district court's judgment on this issue.

D. The Foundation for the Junior Blind Placement

The Jacksons contend that the hearing officer's decision that the FJB was an appropriate educational placement for Bion is supported by a preponderance of the evidence. We agree.

In his August 1990 decision, the hearing officer observed that:

> [The FJB] may well be an appropriate placement; however, the school district will have to determine if the FJB program can address the goals and objectives outlined in Bion's IEP of May 31, 1989, has the appropriate credentialed staff, has facilities which meet state and federal requirements, and has a place for Bion.

Between September 4-18, 1990 Marty Babayco, the Director of Special Education for the School District, attempted to identify a state-certified nonpublic school for Bion. Babayco sought information regarding an appropriate placement from representatives of the FJB and the CSB, experts in the California State Department of Education/Department of Special Education, and officials of the Los Angeles Unified School District and the

Santa Barbara County Superintendent of Schools. In a letter dated September 24, 1990, Babayco informed the hearing officer that all three state experts recommended the FJB as the only state-certified nonpublic school that could serve Bion's needs. The record contains no evidence that contradicts these expert opinions. Indeed, during the November 1990 telephone hearing, the hearing officer asked Babayco whether the FJB would be an appropriate placement for Bion if it had a vacancy. Babayco responded: "Well that was . . . the only option that appeared in my search in terms of serving Bion's needs. It . . . did meet the requirements that were ordered in the fair hearing." In his January 1991 supplemental order, the hearing officer found that "the FJB is an appropriate certified nonpublic school which can meet Bion's current needs in a safe environment."

The school officials challenge the hearing officer's conclusion on three grounds. First, they assert that the state experts who recommended the FJB to Babayco were not sufficiently familiar with Bion's needs to be able to render a valid opinion. We disagree. The School District itself sought advice from these persons precisely because it considered them experts in the field of special education. We are not persuaded by the School District's belated attempt to recast these opinions as unreliable.

Second, the school officials contend that the FJB is not an appropriate placement because it cannot provide some of the services specified in Bion's IEP. We reject this contention because it is not supported by the record. The school officials rely on deposition testimony of David Ekin, Director of Programs and Services at the FJB. Their argument, however, takes Ekin's testimony out of context. Read as a whole, Ekin's testimony demonstrates that the FJB can implement Bion's IEP. Moreover, during the administrative hearings, the School District and the

Superintendent never contested the FJB's ability to serve Bion's needs; instead, they conceded that the FJB was the only nonpublic school in California that could do so. We will not allow them to reverse their position in these proceedings. *See Roland M.*, 910 F.2d at 997 ("[w]e refuse to reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the [IDEA's] judicial review mechanism into an unrestricted trial *de novo*").

Finally, the school officials challenge the legitimacy of the telephone hearings because the hearing officer did not administer oaths to the participants and did not formally admit in evidence the documents he reviewed. We conclude that these omissions do not affect the validity of the proceedings. At the first hearing in April 1990, the parties agreed that the hearings would not be conducted according to the rules of evidence applicable in court. The telephone hearings were recorded and transcribed, and these transcripts are part of the record before us. Similarly, the documents that were submitted to the hearing officer were included in the record of the administrative proceedings. More important, the school officials do not challenge the veracity of any of the information provided to the hearing officer during these telephone hearings. Accordingly, they have not demonstrated that they suffered any prejudice from the hearing officer's procedures.

In sum, we conclude that the hearing officer's decision that the FJB is an appropriate placement for Bion is supported by a preponderance of the evidence. *See* 20 U.S.C. § 1415(e)(2). We therefore reverse the district court's judgment on this issue.

IV. COSTS ASSOCIATED WITH DAY PROGRAM AT THE FJB

The Jacksons assert that the district court erred by overruling the hearing officer's order requiring the school officials to pay for

Bion to reside with his grandparents in Los Angeles, while he attended the FJB's day program. We agree.

The IDEA defines the term "free appropriate public education" to include "special education" and "related services." 20 U.S.C.A. § 1401(a)(18) (West 1990). "Related services" in turn are defined as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education[.]

20 U.S.C.A. § 1401(a)(17) (West Supp. 1993). "The [IDEA] indirectly requires school districts to provide residential placements by defining elementary and secondary schools to include 'residential schools.' " *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings,* 903 F.2d 635, 638 (9th Cir. 1990) (quoting 20 U.S.C. §§ 1401(a)(9) and (10)). The applicable regulations provide that, "[i]f placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 (1992). The commentary to this regulation explains that "[t]his requirement applies to

placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as State school for the deaf or blind." *Id.* The federal regulations further require that, if a disabled child is placed in a private school or facility, the state shall insure that the child "[i]s provided special education and related services: (1) In conformance with an [IEP;] (2) At no cost to the parents; and (3) At a school or facility which meets the standards that apply to State and local educational agencies[.] 34 C.F.R. § 300.401(a) (1992).

The hearing officer found that the FJB was the only appropriate educational placement for Bion, but that there were no vacancies in its residential program. The FJB is located approximately eighty-five miles from the Jacksons' home in Ojai; the hearing officer found that a daily commute to the facility was impossible in light of Bion's fragile health. Faced with this dilemma, the hearing officer concluded that:

> It would logically follow that where [Bion] has identified the *only* appropriate program available to him, *cannot* be admitted to the residential program because it is at capacity at the present time, and *can* enroll in an appropriate nonresident program at the same school, to deny him the reasonable rent compensation, food and caretaker fees which would enable him to attend school would deny him equal treatment from other handicapped children who are placed in the residential program . . . Whether Bion spends the night at FJB (the residential program) or at his grandparents (the nonresidential program) should not affect his ability to receive the free appropriate education to which he is entitled.

Accordingly, the hearing officer ordered that Bion reside at his grandparents' home and attend the FJB's day class. The order further required the School District and the Superintendent to:

> pay school enrollment and tuition fees, transportation from Bion's Los Angeles residence to the [FJB] and return each day. [The school officials] shall also reimburse [Bion] for one round trip per school week between Ojai and Los Angeles, caretaker fees at $35.00 per school day, rent compensation at $300.00 per month/or fraction thereof, and food costs for Bion at $5.00 per day. Reimbursement due Bion's grandparents for rent, and his caretaker's fees, and mileage allowance shall be paid once per month.

We conclude that, in the circumstances of this case, the hearing officer's order was supported factually by a preponderance of the evidence, and was permissible under the applicable regulations. There is no question concerning the dilemma that the hearing officer faced: for reasons already discussed, the only appropriate placement for Bion was at the FJB; the FJB was located far from Bion's home; and it had no presently available room in its residential program. Yet a placement in the FJB's day program was available for Bion, if he could be housed nearby. There is no doubt that the hearing officer's order solved the temporary practical problems that frustrated an appropriate placement for Bion. The only question is whether the compromise, born of highly unusual if not unique circumstances, was consistent with the applicable regulations.

The regulations authorize a placement in a private residential

program, and they provide that when such a placement is necessary it shall include "non-medical care and room and board, . . . at no cost to the parents of the child." 34 C.F.R. § 300.302 (1992). It is therefore clear that, if the FJB had had a residential placement available for Bion, the School District would have been liable for the costs of his room, board, and other supportive services. *See* 20 U.S.C.A. § 1401(a)(18) (West 1990).

When the hearing officer entered his order, Bion was on a waiting list for residential placement at the FJB, and the housing arrangement at Bion's grandparents' residence was clearly intended as an interim measure. The hearing officer's order may be viewed as temporarily extending the reach of the FJB's residential program. It permitted Bion to secure the only appropriate education available to him, at no cost to his parents.

The school officials argue that the regulations impose on the School District only a duty to provide Bion with special education and related services "[a]t a school or facility which meets the standards that apply to State and local educational agencies[.]" 34 C.F.R. § 300.401(a)(3) (1992). Nothing in the hearing officer's order, however, deviates from this regulation. Bion's education, and the related services defined in 20 U.S.C.A. § 1401(a)(17) (West Supp. 1993), will be provided at the FJB, and there is no contention that the FJB fails to meet state standards. The provision of related services such as "developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, . . . and [diagnostic] medical services)," *id.*, will be the function of the FJB, not of Bion's grandparents. The fact that Bion is temporarily spending nights at his grandparents' house instead of at the FJB does not prevent the School District from meeting its responsibilities under the regulation. To deny reimbursement for

Bion's residential and caretaking expenses at his grandparents, on the other hand, would preclude the School District from providing Bion an appropriate education by private placement "at no cost to the parents," as it is required to do. 34 C.F.R. § 300.302.

We agree, however, that the School District's financial obligation arises from its duty to provide placement in a private *residential program* when necessary. The School District should not be prejudiced by the special, temporary arrangement for accommodations ordered by the hearing officer. The School District's total liability to pay the costs of Bion's room and board, caretaker and transportation fees, along with the costs of education and related services provided by the FJB under its day program, may not exceed the cost that the state would have incurred had Bion been placed in the FJB's residential program. Subject to that limitation, we reverse the district court's ruling that the School District is not liable for Bion's room, board, transportation and caretaking fees incurred in connection with his temporary residence at his grandparents' house.

V. RESIDENTIAL PLACEMENT AT THE FJB

The district court also concluded that the hearing officer's decision that Bion required a residential placement was not supported by a preponderance of the evidence and was incorrect as a matter of law. As we already have explained, we agree with the hearing officer's conclusions that the FJB is the only appropriate educational placement available to Bion, and that a daily commute from Ojai to the FJB is incompatible with Bion's needs. Accordingly, we reverse the district court's decision and hold that Bion must be enrolled in the FJB's residential program as soon as a place becomes available. *See* 34 C.F.R. § 300.302.

Finally, the district court concluded that "[t]he hearing officer's decision that Bion Jackson required a full time school aide in order to benefit from his special education was not supported by a preponderance of the evidence and is incorrect as a matter of law." We reject this conclusion because the district court misstated the hearing officer's decision. The hearing officer found only that "[i]n the event that an additional school aide is needed for Bion, that cost will be borne by [the school officials]." This finding was based on information presented during the December 1990 telephone hearing. At that hearing, Bion's advocate stated that David Ekin, the Director of the FJB, had indicated that, if Bion were enrolled at the FJB, the school might have to hire an additional aide to accommodate his needs. The FJB could not conclusively determine whether such an aide would be required, however, until Bion was admitted and evaluated by FJB personnel. Thus, the record before us contains insufficient evidence to allow a determination on this issue. If the FJB determines that an additional aide is necessary, however, we note that the statutory provisions and regulations would require the school officials to bear his expense. *See* 20 U.S.C. § 1401(a)(17) (related services that must be provided include "supportive services" necessary "to assist a child with a disability to benefit from special education"); 34 C.F.R. §§ 300.302 and 300.401(a)(2) (child's placement at a private residential school must be at "no cost" to the parents; services to be provided include "non-medical care").

VI. ATTORNEY'S FEES

The Jacksons have requested an award of attorney's fees. Pursuant to 20 U.S.C.A. § 1415(e)(4)(B) (West Supp. 1993), "the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party." Because the Jacksons have

prevailed, we conclude that they are entitled to recover their reasonable attorney's fees for both the district court proceedings and this appeal. *See Ash*, 980 F.2d at 590 (awarding attorney's fees to prevailing parents) (citing *Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell*, 940 F.2d 1280, 1286 (9th Cir. 1991)). Accordingly, we remand the case to the district court for a determination of a reasonable fee award.

VII. CONCLUSION

We reverse the district court's decision. We remand with instructions to reinstate the hearing officer's decision ordering Bion to be enrolled in the FJB's day program until a place becomes available in its residential program. Finally, we remand for a determination of a reasonable award of attorney's fees.

REVERSED AND REMANDED.

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Deputy Clerk

COUNSEL

Sharon A. Watt, Filarsky & Watt, Ventura, California, for Plaintiffs-Appellees.

David R. Ellison, Ellison, Hinkle & Bayer, Ventura, California, for Defendants-Appellants.

APPENDIX E — FINDINGS OF FACTS AND CONCLUSIONS OF LAW DATED SEPTEMBER 17, 1991

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OJAI UNIFIED SCHOOL DISTRICT
AND VENTURA COUNTY SUPERINTENDENT
OF SCHOOLS

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 90 4915 R

OJAI UNIFIED SCHOOL DISTRICT AND VENTURA COUNTY SUPERINTENDENT OF SCHOOLS

Plaintiffs,

vs.

THE CALIFORNIA SPECIAL EDUCATION HEARING OFFICE (CENTER FOR ADMINISTRATIVE JUSTICE - McGEORGE SCHOOL OF LAW); RAYMOND C. BROWN, HEARING OFFICER; CALIFORNIA STATE DEPARTMENT OF EDUCATION; BILL HONIG, in his official capacity as STATE SUPERINTENDENT of PUBLIC INSTRUCTION, STATE OF CALIFORNIA; BION JACKSON a minor; ELIZABETH JACKSON; RICHARD JACKSON,

Defendants.

Appendix E

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW
Local Rule 17.14.1

Hearing Date:	September 3, 1991
Time:	10:00 a.m.
	The Honorable
	Manuel L. Real

This matter is before this court on plaintiff's Motion for Summary Judgment. This matter came on regularly for hearing before the Honorable Manuel L. Real, Judge United States District Court on September 3, 1991. Sharon A. Watt appeared as counsel for the Ojai Unified School District and the Ventura County Superintendent of Schools. David Ellison appeared as counsel for the Jackson defendants. No appearance was made by State defendants.

In granting plaintiff's Motion for Summary Judgment, the Court enters this statement of material undisputed facts and its conclusions of law.

MATERIAL FACTS

1. Bion Jackson was born on February 12, 1979.

2. Bion Jackson is a severely disabled male student. He is considered to be multi-handicapped.

3. Bion Jackson suffers from Rubella Syndrome.

4. At the time of the hearing Bion Jackson was 11 years, 4 months old.

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5. On May 31, 1989, the Ojai Unified School District and Ventura County Superintendent of Schools held an Individualized Education Program meeting and found Bion Jackson eligible for special education and services.

6. At the time of the May 31, 1989 IEP meeting for special education and services eligibility of Bion Jackson was based on the following handicapping conditions, deaf and blind; developmental delay and multi-handicapped.

7. The eligibility for special education was based upon the facts that Bion Jackson has no vision or hearing; is not ambulatory and is functioning far below his chronological age.

8. At the May 31, 1989 IEP, the Ojai Unified School District offered a placement for Bion Jackson at Penfield School in a special day class. Penfield School is a public school located in Ventura County and operated by the office of the Ventura County Superintendent of Schools.

9. The class offered to Bion Jackson at the IEP is taught by Saroulta Dala, an experienced teacher who holds a California teaching credential.

10. The classroom composition in Ms. Dala's class, when it was offered to Bion Jackson, consisted of ten (10) severely handicapped students.

11. The class at Penfield School is adjacent to a regular education campus so that Bion would have the opportunity to mainstream with regular education students as it became appropriate for him.

12. The class offered at Penfield School has a speech and language specialist and an orientation and mobility teacher as well as a teacher of the deaf/blind available to provide those services to students who have the services included in their IEP.

13. In addition to the special day class placement, Bion Jackson was offered the following designated instructional services: extended school year; the services of a deaf/blind specialist; speech and language services; and instruction from an orientation and mobility teacher. The designated instruction and services totalled a minimum of six and one-half (6 1/2) hours per week of specialized intensive instruction.

14. Jackson defendants refused the placement offered at Penfield School and have requested public funds to pay for a private school placement.

15. The Jackson defendants requested a mediation on the issue of placement. The mediation was held on September 27, 1989. At that mediation the parties could not come to an agreement and the issue was framed as follows:

> "Has the Ojai Unified School District offered an appropriate educational program in a safe environment for Bion? If not, should the District be required to identify a non-public school program which can provide Bion with an appropriate program in a safe environment and to place Bion in that program?"

16. On November 16, 1989, a hearing was held at the request of the District to determine whether further assessment should be conducted of Bion and by whom.

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17. In January, 1990, the California School for the Blind assessed Bion Jackson and prepared a report of its findings.

18. The parties were still unable to come to an agreement on the issue of placement and the administrative hearing on placement was heard on April 3, 4, and June 26 and 27, 1990. A full and complete copy of that transcript has been lodged with this Court.

19. The hearing officer assigned to hear the case was Raymond C. Brown.

20. In his decision dated August 14, 1990, the hearing officer ordered the Ventura County Superintendent of Schools and the Ojai Unified School District to "identify a State certified non-public school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school." (Decision page 15).

21. Part of the hearing officer's decision dated August 14, 1990 included the statement "The due process hearing did not produce sufficient evidence to make a determination that the Foundation for the Junior Blind (FJB) is an appropriate placement for Bion." (Decision page 15).

22. Following receipt of the decision, employees of the Ojai Unified School District attempted to locate a non-public school which would be appropriate for Bion Jackson. As of September 24, 1990, District staff was unable to locate a school which would accept Bion and meet his needs. This information was conveyed to the hearing officer.

23. A telephone conference was held on November 1, 1990 between Mr. Babayco, Director of Special Education, Ojai Unified

School District; Diana Novak, Director of Special Education, Ventura County Superintendent of Schools; Elizabeth Jackson, petitioner's mother; and Colleen Ashley, petitioner's advocate. During the telephone conference which was held on November 1, additional oral testimony was not taken, witnesses were not called to testify or duly sworn. No additional or written evidence was marked as an Exhibit or entered into the hearing record.

24. On December 18, 1990, a second telephone conference was held at the request of the hearing officer. During that telephone conference, Mr. Babayco objected to the conference, stating that the case had been appealed to Federal Court. The hearing officer continued the conference over Mr. Babayco's objections.

25. No oral evidence was admitted during the telephone call on December 18, 1990, or witnesses duly sworn in during that telephone conference. No additional written evidence was marked as an Exhibit or entered into the hearing record.

26. The hearing officer issued his original order on August 14, 1990.

27. On January 2, 1991, the hearing officer issued a "Supplemental Order" to his original order.

28. The programs offered at Penfield School and DeAnza offer a free, appropriate public education to Bion Jackson.

29. The programs offered to Bion Jackson at Penfield School and DeAnza are able to implement the goals, objectives and instructional methods required for Bion Jackson as identified in his IEP dated May 31, 1989, and June 3, 1991.

Appendix E

30. The recommendations of the classes taught by Saroulta Dala at the Penfield School and the classes taught by Alday and Sanders at the DeAnza School meet all of the legal requirements for the placement of severely handicapped children.

CONCLUSIONS OF LAW

1. Summary Judgment shall be rendered forthwith as the evidence presented shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Federal Rule of Civil Procedure 56.)

2. Section 1415(e)(2) of the Individuals With Disabilities Education Act (the "IDEA") permits any party aggrieved by the findings and decision of the State administrative hearing to bring a civil action in any court of competent jurisdiction without regard to the amount in controversy. 20 U.S.C. Section 1415(e)(2).

3. In hearing a complaint, the IDEA provides that a court "shall receive the record of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415(e)(2).

4. Judicial review of an administrative decision rendered pursuant to the IDEA requires the court to make an independent decision based on a preponderance of the evidence. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 205 (1982); 20 U.S.C. Section 1415(e)(2).

5. The reviewing court is to make two inquiries; (1) Has the responsible school agency complied with the procedures set forth

in the IDEA?, and (2) Is the Individualized Education Program developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley,* 458 U.S. 176, 206-7.

6. The IDEA, 20 U.S.C., Section 1400 *et seq.*, provides federal funds to the states for assistance in the education of handicapped children.

7. To qualify for these federal funds, a state is required to have in effect a policy that insures a handicapped receives a "free, appropriate education". 20 U.S.C. Section 1412(2)(c).

8. The hearing officer's decision that the Penfield School could not meet Bion Jackson's educational needs was not supported by a preponderance of the evidence and, therefore, is incorrect as a matter of law.

9. The hearing officer's decision that the Foundation for the Junior Blind could provide an appropriate education for Bion Jackson is not supported by a preponderance of the evidence and incorrect as a matter of law.

10. The hearing officer's decision that Bion Jackson required a residential program in order to benefit from his special education was not supported by a preponderance of the evidence and was incorrect as a matter of law.

11. The hearing officer's decision that Bion Jackson required a full time school aide in order to benefit from his special education was not supported by a preponderance of the evidence and is incorrect as a matter of law.

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12. The hearing officer's decision in ordering that the School District and Ventura County Superintendent of Schools were required to pay rent, compensation, caretaker fees, and food costs for Bion Jackson was in excess of his jurisdiction and incorrect as a matter of law. Congress never intended the IDEA to compensate families for rent, caretaker fees, and food costs.

13. The school agencies complied with the procedural requirements of the IDEA.

14. The Individualized Education Program developed for Bion Jackson is reasonably calculated to enable him to receive educational benefits.

Dated: September 17, 1991

FILARSKY & WATT
By: s/ Sharon A. Watt
SHARON A. WATT
Attorney for Plaintiffs

Dated: SEP 24 1991

LAUGHLIN E. WATERS for
Manuel L. Real
UNITED STATES
DISTRICT JUDGE

APPENDIX F — RELEVANT STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1401. Definitions

(a) As used in this chapter -

* * *

(18) The term "free appropriate public education" means special education and related services that —

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the

parents or guardian of such child, and, whenever appropriate, such child, which statement shall include —

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Appendix F

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C § 1412. Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

> (1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C § 1413. State plans

(a) **Requisite features.** Any State meeting the eligibility requirements set forth in section 1412 and desiring to participate in the program under this part shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall —

* * *

(4) set forth policies and procedures to assure —

* * *

(B) that —

> (i) children with disabilities in private

schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

20 U.S.C § 1415. Procedural Safeguards

(e) Civil action; jurisdiction

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the

administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

34 C.F.R Ch. 111. Office of Special Education and Rehabilitation Services, Education

§ 300.349 Individualized education program — accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

§ 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

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(1) In conformance with an individualized education program which meets the requirements under §§ 300.340-300.349 of subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

§ 300.347 Private school placements.

(a) *Developing individualized education programs.*

(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

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(b) *Reviewing and revising individualized education programs.*

(1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

34 C.F.R. § 300.16 Related services

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

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(1) "Audiology" includes —

(i) Identification of children with hearing loss:

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing:

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss:

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services

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(5) "Occupational therapy" includes —

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes —

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological

services, including psychological counseling for children and parents.

(9) "Recreation" includes —

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(ii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes —

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family.

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn us effectively as possible in his or her educational program.

(13) "Speech pathology" includes —

(i) Identification of children with speech or language impairments.

(ii) Diagnosis and appraisal of specific speech or language impairments;

(ii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes —

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses,

lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(a)(17))

34 C.F.R. § 300.302 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

Supreme Court, U.S.
FILED
AUG 5 1994
OFFICE OF THE CLERK

No. 93-2074

In The

Supreme Court of the United States

October Term, 1994

OJAI UNIFIED SCHOOL DISTRICT; VENTURA COUNTY SUPERINTENDENT OF SCHOOLS; THE CALIFORNIA STATE DEPARTMENT OF EDUCATION; THE CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA,

Petitioners,

vs.

BION JACKSON, a minor; ELIZABETH JACKSON; RICHARD JACKSON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. THE DECISION OF THE HEARING OFFICER IN THIS CASE IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND WAS ACCORDED DUE WEIGHT BY THE NINTH CIRCUIT.

2. THE ORDER PROVIDING FOR PAYMENT OF RENT, CARETAKER FEES AND MILEAGE ARE SUPPORTED BY "RELATED SERVICES" PROVISIONS OF THE I.D.E.A.

3. PETITIONERS HAVE UTTERLY FAILED TO CARRY THEIR BURDEN IN ATTACKING THE SPECIAL HEARING OFFICER'S DECISION IN THIS CASE.

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STATEMENT OF THE CASE

Respondents herein adopt the Ninth Circuit's "Factual & Procedural Background", Petition, pages 9a through 13a. In addition, respondents have included numerous documents in the appendix herein which respondents feel are important to the Court's understanding of the true facts as opposed to petitioners' version of the facts herein.

STATEMENT OF FACTS

Bion Jackson is a severely disabled male born February 12, 1979. Bion is blind and deaf as a result of rubella syndrome. He was hospitalized for the first two years of his life. Until age three, Bion was in a respite facility where his mobility was extremely limited. Due to Bion's physical problems, he has been developmentally disabled since infancy.

Educational Assessments of Bion Jackson:

Numerous assessments of Bion Jackson have been conducted over the years. The most recent assessment of Bion, for purposes of this appeal, was an assessment from the California School for the Blind ("CSB") dated January 1990. This independent assessment was ordered by Hearing Officer Fait in a previous administrative hearing held November 16, 1989 regarding proper assessment of Bion Jackson. In this 1990 assessment, the "CSB" made the following recommendations:

> " . . . Bion needs activities that are functional and meaningful to his immediate needs and

> capabilities . . . Since care givers are required to be in physical contact, one to one, teaching should be highly stressed. This approach could be best implemented within a program specifically designed for deaf blind students".

After reviewing each of Bion's Individual Education Plans (IEP) over the period 1982 to 1988 and the two previous assessments conducted in 1982 and 1990, the Hearing Officer in this matter concluded that after seven years in the public school system in Ventura, County, Bion Jackson still:

1. Does not have a language;

2. Is not toilet trained;

3. Has few self-help skills.

Administrative Hearing Evidence:

Based upon the Hearing Officer's review of:

(1) 1982 California School for the Blind Assessment;

(2) All IEPs and their supplemental documents;

(3) 1990 California School for the Blind Assessment;

(4) Oral testimony from all witnesses, the Hearing Officer concluded that Bion Jackson was ***not*** receiving the basic level of educational benefit contemplated by state and federal laws. The Hearing Officer also reasonably concluded that the evidence **did not** establish that Penfield School was a placement which would enable Bion to make necessary educational progress as is required by *Hendrick Hudson Bd. of Ed. Dist. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Administrative Hearing Decision:

The Hearing Officer held:

> "In his school district placements, Bion has not benefitted educationally because he has not made satisfactory progress towards his IEP goals and objectives. The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit."

The Hearing Officer, pursuant to his official capacity and expertise on these matters determined that the evidence taken as whole indicated that another approach ***must*** be taken towards educating Bion Jackson. In so doing, the Hearing Officer ordered the plaintiff school districts to place Bion Jackson in a non-public educational facility for a period of one year.

Attempts to Locate an "Appropriate Placement":

In an attempt to locate an appropriate placement for Bion Jackson per the August 14, 1990 administrative order, Marty Babayco, as Director of Special Education for the Ojai Unified School District, undertook exhaustive attempts to locate an appropriate educational facility equipped to provide for Bion's educational needs. In a letter dated September 24, 1990 from Mr. Babayco to Raymond Brown as Hearing Officer, (Appendix A, attached hereto) Mr. Babayco indicated that the first institution which he contacted in his attempt to locate an

appropriate placement was the Foundation for the Junior Blind. The September 24, 1990 letter lists the numerous recommendations to the Foundation for the Junior Blind which were received by Mr. Babayco. The following individuals recommended the FJB as a proper placement for Bion Jackson: (1) Mr. Paul Starkovich, State Consultant for Non-public Schools referred Mr. Babayco to the FJB, stating that the FJB was the only non-public school with the type of services that could possibly serve Bion's needs; (2) Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services also recommended the FJB for Bion; (3) Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California also suggested the FJB as an appropriate placement for Bion.

Administrative Supplemental Order:

After receiving the September 24, 1990 letter and other correspondence from Coleen Ashly (Advocacy Specialist for the Jacksons) regarding the FJB program and costs, the Hearing Officer submitted a supplemental order dated January 2, 1991. (Appendix B, attached hereto). In this order the Hearing Officer concluded that the Foundation for the Junior Blind ("FJB"), located in Los Angeles, California was the only facility qualified in the State of California to provide Bion Jackson with an appropriate educational setting as is required by state and federal law. This conclusion comported with the opinion of California State educational experts as evidenced in the September 24, 1990 letter.

In view of the fact that the FJB was the ***only placement for Bion Jackson***, the hearing ordered that Bion be

placed there in the day program and ordered the payment of "related services" to facilitate Bion's attendance in the day program until such time as Bion could be admitted in the residential program at the FJB.

The Ninth Circuit concurred in all respects with the Hearing Officer's decision in this case. The Ninth Circuit also made it clear that the "related services" such as caretaker fees, rent and food could not exceed the costs that would have been incurred had Bion been admitted in the residential program at the FJB. (See Petition, Appendix D, page 34a).

SUMMARY OF ARGUMENT

The petition herein offers no substantive issues but merely repeats those losing arguments which petitioners asserted before the Ninth Circuit. Petitioners also misstate and confuse the facts in the hope that this Court will grant review.

A true reading of the facts of this case reveals that the hearing officer determined after several days of fair "due process" hearings that the petitioner school district was not offering Bion an "appropriate education" at his current placement with the petitioner school district. Accordingly, the hearing officer ordered the petitioner school district to identify a non-public educational placement for Bion which could implement Bion's Individual Educational Plan. In accordance with the hearing officer's order, petitioner school district special education officials identified the Foundation for the Junior Blind (hereinafter

the FJB) as being the only educational placement in California that could effectively educate Bion as required by the I.D.E.A. After having received the petitioner school district's recommendation for the FJB, the hearing officer considered additional evidence and then ordered placement at the FJB day program. The facts also reveal that in order to effectuate placement at the FJB, the special education hearing officer determined that certain expenditures were ***temporarily*** necessary to immediately place Bion at the FJB in their day program until such time as space became available for a pure "residential placement" for Bion at the FJB.

REASONS FOR DENYING THE WRIT

1. THE DECISION OF THE HEARING OFFICER IN THIS CASE IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND WAS ACCORDED DUE WEIGHT BY THE NINTH CIRCUIT.

The Ninth Circuit stated in *Gregory K. v. Longview School Dist.*, 811 F.2d 1307 (9th Cir. 1987) as follows:

> "[3] As the Supreme Court has held, courts must give 'due weight' to judgments of education policy when they review state hearings under 20 U.S.C. § 1415(e). (citations). Citing *Rowley*, we have held that 'courts should not substitute their own notions of sound educational policy for those of the school authorities which they review." (811 F.2d at p. 1311)

In *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988), the D.C. Circuit Court of Appeals took the lower district court to task for its unexplained preference for the conclusions of those who opposed the hearing officer's view. The D.C. Circuit reversed and remanded to the district court "for the district court to directly tackle the issue of whether the opposing parties' showing is enough to overcome the hearing officer's conclusion that the proposed placement was 'appropriate' as that term is used in § 1412(a)." In *Town of Burlington v. Dep't. of Ed.*, 736 F.2d 773, 792 (1st Cir. 1984), *affirmed*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the First Circuit Court of Appeals stated:

> "The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue." (736 F.2d at p. 792)

The court in *Burlington* (*supra*) also recognized that it is difficult to identify a significant federal interest in overturning a state administrative agency's supportable finding that one of its own school systems has not complied with state standards. (See 736 F.2d at p. 792). The First Circuit concluded that school systems have a "set of affirmative obligations" that are to be carried out under the "scrutiny of state educational agencies" and the federal and state courts are the last resort. (See 736 F.2d at p. 792).

This rule requiring a "limited review" in cases under 20 U.S.C. § 1415(e) was explicitly set forth by the Supreme Court in *Hendrick Hudson Bd. of Ed. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the seminal decision on the scope of judicial review under the Act. According to the Court in *Rowley* (*supra*) a court can ask only: (1) whether the State has complied with procedures set forth in the Act, and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefits. (See *Rowley* 102 S.Ct. at 3051). In *Bertolucci v. San Carlos Elementary School Dist.*, 721 F.Supp. 1150 (N.D.Cal. 1989) the U.S. District Court for the Northern District of California summarized the Supreme Courts' holding in *Rowley* by stating:

> "*Rowley* noted that the provision that a reviewing court base its decision on the preponderance of evidence is not an invitation for courts to substitute their notions of sound educational policy for those of the school authorities which they review. The Court reasoned that the requirement that courts receive the record below impliedly requires courts to give due weight to the administrative proceeding" (721 F.Supp. at p. 1154)

Here, the Hearing Officer determined after lengthy administrative hearings, that (1) the IEP for Bion Jackson was not reasonably calculated to provide Bion with an opportunity to benefit from education, and (2) that the appropriate placement for Bion was the Foundation for the Junior Blind (Appendix B).

From a review of the administrative records and the decisions made by the Hearing Officer in this case, one

cannot doubt that the two pronged analysis enunciated by the Court in *Rowley*, (*supra*) has been satisfied. This conclusion is further supported by the Ninth Circuit's decision in this case which adopts the Hearing Officer's decisions as being supported by a preponderance of the evidence. (Petition, Appendix D).

2. THE ORDER PROVIDING FOR PAYMENT OF RENT, CARETAKER FEES AND MILEAGE ARE SUPPORTED BY "RELATED SERVICES" PROVISIONS OF THE I.D.E.A.

Petitioners seek review of a Ninth Circuit decision which is firmly grounded in well established statutory and case laws which have addressed the scope of "related services" and the In-Lieu of Transportation costs which are appropriate under the Individuals with Disabilities Education Act. Respondents adopt the findings and reasoning of the Ninth Circuit on these issues as outlined in the Ninth Circuit's opinion. (Petition, Appendix D).

The special education Hearing Officer determined, after hearing a plethora of evidence on this issue, that the FJB was the ***only*** appropriate educational placement for Bion Jackson. Indeed, the petitioner school district's special education director, Dr. Marty Babayco, informed the hearing officer by letter on September 24, 1990 (See Appendix A) that he (Dr. Babayco) had consulted with numerous State of California Special Education specialists who had all identified the FJB as being the only placement that would meet Bion Jackson's special education needs as outlined in Bion's IEP It was also recognized by the hearing officer that Bion Jackson could not

travel the 85 miles from Ojai, California to Los Angeles, California on a daily basis to attend the day program. According to Bion's physician, such extensive transportation would cause medical difficulty for Bion (See Appendix B, page 8). Because of this travel limitation, it was deemed necessary that Bion reside close to the FJB in Los Angeles during the week and return home to Ojai, California on the weekends. Therefore, the hearing officer ordered that the petitioner school district pay for Bion's caretaking, rent compensation and food while Bion attended the day program at the FJB. (See Appendix B, page 8 through 9). Said order was only effective until the end of the 1990-91 school year. (Appendix B, page 11).

With the voluminous administrative record as a guide, both the Hearing Officer and the Ninth Circuit found that the petitioner school district's placement for Bion was not appropriate under the I.D.E.A. Further, both the Hearing Officer and the Ninth Circuit further concurred that Bion's placement at the FJB day program was correct and consistent with the purposes of the I.D.E.A. Respondents expressly adopt the findings and reasoning of the Ninth Circuit in this regard. (Petition, pages 27a through 35a).

The United States Supreme Court has held in *Rowley* (*supra*) that in order to satisfy its duty to provide a free appropriate public education, a state must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." (*Rowley* at p. 3049) The Act defines "handicapped children" as "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired,

or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (Supp.III 1985). The term "related services" is defined by the Act as follows:

> "(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services. . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (20 U.S.C. § 1401(17)

In determining what is or is not a "related service", the Ninth Circuit held in *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) that this analysis must focus on whether the expense is **necessary for educational purposes.** (See 903 F.2d at p. 643) In the instant case, the Hearing Officer ordered the payment of Rent, Caretaker and Food costs because it was necessary for Bion Jackson to relocate to the Los Angeles area in order to allow him to attend the FJB day program. This order was temporary until Bion could be accepted in the 24 hour residential program offered by the FJB. It is patently obvious that payment of these expenses is necessary to provide to Bion the access to education which the Act requires. In *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988), the Eleventh Circuit Court of Appeals affirmed the lower district courts finding that

the board of education pay to the parents of a handicapped child, all out-of-pocket expenses incurred in placing their child in a treatment center which was ultimately determined to be an appropriate placement. (See 853 F.2d at p. 857) The court in *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) stated:

> "Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." (744 F.2d at p. 517)

With these cases in mind, the administrative hearings held in this matter determined that only ONE placement was appropriate for Bion, this placement was the FJB. In order to effectuate Bion's placement at the FJB, it was deemed necessary to temporarily incur the above referenced costs in order to effectuate the intent of the Act until such time when Bion could be admitted into the residential program.

Respondents contend the cost of a "second residence" also falls within the category of "**necessary for educational purposes**" costs and as such should be accorded "related services" status. (See *Clovis Unified* (*supra*) 903 F.2d at p. 643) The proposed "second residence" is the only way to make an "appropriate" educational environment available to Bion, an environment which he desperately needs. One would hope that "cost considerations" not be used in a fashion to prevent Bion Jackson, and other children like him, from obtaining what they are entitled to by the command of both federal and state law.

3. PETITIONERS HAVE UTTERLY FAILED TO CARRY THEIR BURDEN IN ATTACKING THE SPECIAL HEARING OFFICER'S DECISION IN THIS CASE.

In *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988), the Eleventh Circuit held that the party attacking the administrative hearing decision has the burden of proving that the decision is clearly erroneous. Respondents assert that the petitioners herein have not satisfied their burden to prove that the administrative hearing findings are clearly erroneous. Instead of offering facts in support of their petition, petitioners engage in factual fabrication. This fabrication is adequately revealed by reading petitioners' Statement of Facts and Conclusions of Law (See Petition, Appendix E) and comparing said document to the accurate facts as outlined in respondents' Objections to the Petitioners' Statement of Uncontroverted Facts and Conclusions of Law (See Appendix C, attached hereto).

4. CONCLUSION.

Respondents assert that the Hearing Officer's decision in this case was in response to the unique circumstances and special educational needs of Bion Jackson. Indeed, the Ninth Circuit recognized this fact when it held in respondents' favor and ordered placement of Bion Jackson in the day program at the Foundation for the Junior Blind. Four years have elapsed since the petitioner school district filed its lawsuit to obtain judicial review of the Hearing Officer's decision in this case. Respondents assert that it is time to implement this order and provide

Bion with the educational benefits which Congress intended him to receive in passing the I.D.E.A. It is hoped that the Court will recognize the validity of the Ninth Circuit's decision in this case and the unique circumstances presented by this case.

Due to the patent validity of both the Hearing Officer's decision and the decision of the Ninth Circuit, the petition for writ of certiorari must be denied.

DATED: August 5, 1994

Respectfully submitted,

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APPENDIX A

OJAI UNIFIED SCHOOL DISTRICT
414 East Ojai Avenue • Post Office Box 878 • Ojai, California 93023 • (805) 640-4300

September 24, 1990

Raymond Brown
Hearing Officer
California Special Education Hearing Office
Institute for Administrative Justice
McGeorge School of Law
32009 Fifth Avenue
Sacramento, California 95817

RE: CASE NO: SN 313-89H
DECISION: BION JACKSON

Dear Mr. Brown:

The Ojai Unified School District and the Ventura County Superintendent of Schools have tried to comply with your order *"to identify a state certified nonpublic school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school."* However, it appears that no such nonpublic school is available or suitable with the requirements as ordered by your decision.

I called The Foundation for the Junior Blind (F.J.B.) in Los Angeles on September 4 and requested admittance for Bion Jackson. The Foundation for the Junior Blind, as you recall, was the mother's first choice for a nonpublic school during the hearing. The Director of Social Services, Ms. Marie Johnson, stated that their residential/school program is currently filled. She also stated they do not

have any vacancies, nor do they anticipate any with this year (Please see attached letter).

I have also contacted leading experts in the California State Department of Education, Department of Special Education for their expertise and guidance. Mr. Paul Starkovich, State Consultant for Nonpublic Schools stated that nonpublic school facilities were limited for severely handicapped individuals that required deaf/blind services. He referred me to the F.J.B. and said that was the only nonpublic school with the type of services that would possibly serve Bion. When asked about out-of-state schools, he again did not know of any on the state's certified nonpublic school list that would serve such a low functioning deaf/blind individual.

Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services recommended the F.J.B., but could not suggest any nonpublic school setting in the State of California or out of state that would serve such a low functioning deaf/blind individual. He suggested the state's special school, California School for the Blind.

Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California, was contacted but could not suggest any nonpublic schools other than the Foundation for the Junior Blind. She felt he may be too low functioning for their program.

From the California School for the Blind, I talked to Dr. Peg Campbell, Assistant Superintendent, Steve Goodman, Admissions Director and Richard Russo, Assessment Director. Dr. Campbell and Mr. Russo were part of Bion's assessment team when he was assessed at the California School for the Blind. Neither had advice on

where to send Bion. Mr. Goodman also did not have any suggestions. When I asked about the possibility of Bion attending their school, all three stated that Bion's functioning level was too low for their type of program.

When I reported to Mrs. Jackson, Bion's mother, about the lack of placement options, she stated she wanted someplace in Southern California. She had also contacted the Foundation for the Junior Blind and found that they did not have any vacancies.

I have also contacted the Santa Barbara County Superintendent of Schools Office, Los Angeles Unified School District, and Los Angeles County Superintendent of Schools Office inquiring about their deaf/blind services. Ms. Audrey O'Neil, Director of Special Education for Santa Barbara County serves all severely handicapped children in special day classes on regular school sites with DIS services. They do not have any credentialed deaf/blind instructors. Ms. Julia Newman, Program Specialist with Los Angeles Unified reports that they have several special centers that serve deaf/blind students that are similar to the Pennfield school where Bion is currently enrolled. Los Angeles County Schools reported that they too are similar to what we have been currently providing – a Developmental Center for the Handicapped with Designated Instructional Services providing auxiliary deaf/blind services.

Attached is a chronology of the people and institutions I contacted in my search for a nonpublic school that would fit Bion's needs as identified by his IEP and your hearing order.

I am at a loss trying to locate a nonpublic school that will fit Bion's low incidence handicapping conditions that will meet the hearing order. Please advise me on how to proceed. If you have any questions or concerns regarding this matter, please call me at (805) 640-4300.

Sincerely,
/s/ Marty Babayco
Marty Babayco
Director of Special Education

cc Dr. Andy Smidt, Superintendent, Ojai Unified
Ms. Diana Novak, Director of Special Education, Ventura County
Dr. James Foster, SELPA Director, Ventura County

APPENDIX B

BEFORE THE
CALIFORNIA SPECIAL EDUCATION
HEARING OFFICE

IN THE MATTER OF: BION JACKSON, Petitioner, vs. OJAI UNIFIED SCHOOL DISTRICT AND VENTURA COUNTY SUPERINTENDENT OF SCHOOLS, Respondents.	CASE NO: SN 313-89H SUPPLEMENTAL ORDER

A TELEPHONE CONFERENCE HEARING WAS HELD ON: November 1, 1990, at 10:00 a.m.

Parties included:

Marty Babayco, Director of Special Education, Ojai Unified School District

Diana Novak, Director of Special Education, Ventura County Superintendent of Schools

Elizabeth Jackson, Petitioner's mother

Colleen Ashly, Petitioner's advocate

The purpose of this part of the hearing was to review the actions of the Ojai Unified School District in its attempt to implement the order of the Hearing Officer, dated August 14, 1990, which reads in part:

> Within 45 days from the date of this order, the Venture County Superintendent of Schools

> and the Ojai Unified School District are to identify a state-certified nonpublic school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school.

On September 27, 1990, the California Special Education Hearing Office, McGeorge School of Law, received a letter, with enclosures, dated September 24, 1990, from Mr. Babayco. The letter outlined the efforts of the Respondents to comply with the order of the Hearing Officer. The enclosures included a letter, dated September 17, 1990, to the District from Ms. Marie Johnson, Director of Social Services for the Foundation for the Junior Blind, and a chronology of contacts regarding a nonpublic school placement for Bion Jackson, which was dated September 24, 1990.

Mr. Babayco's letter indicated the Respondents were unable to place Bion in the California Foundation for the Junior Blind, as there were no vacancies, and the School did not anticipate any vacancies this school year. Ms. Johnson's letter supports this statement by Mr. Babayco.

Mr. Babayco's chronology lists the people and institutions he contacted in his search for a nonpublic school that would fit Bion's needs as identified by his IEP and the Hearing Officer's order. The chronology includes contacts with state and local officials familiar with special education programs in California and, in some instances, programs outside of California. Bion's parents were also contacted. Mr. Babayco closed his letter with the comment, in part: "I am at a loss to locate a nonpublic school that will fit Bion's low incidence handicapping conditions that will meet the hearing order."

On September 28, 1990, the Hearing Officer responded to Mr. Babayco's letter, by acknowledging receipt of the documents and asking for clarification on these two points:

> . . . First, in your search for the appropriate placement, did you limit your search to southern California, or did you canvass the entire State? Second, in the case of the Foundation for the Junior Blind, what period constitutes its school year, and does it anticipate a vacancy Bion could fill at the end of its school year, or is the waiting list of students so lengthy that Bion might not be accepted for a number of years?

On September 28, 1990, the Hearing Officer also sent a copy of Mr. Babayco's letter and enclosures of September 24, 1990, to Petitioner's parents and advocate, together with a letter of transmittal. A copy of the transmittal letter was sent to Respondents.

On October 12, 1990, a response to the Hearing Officer's letter of September 28, 1990, was received from Mr. Babayco, in which he stated his search for a state-certified nonpublic school included the entire state and all state-certified nonpublic schools outside of California. Mr. Babayco also reported that the Foundation for the Junior Blind's school year runs from September to June and they do not anticipate any vacancies during this school year. Mr. Babayco also argued that the limit of a fair hearing order was one year, and seeking placement options for the following school year would exceed the authority of the Hearing Officer.

The Hearing Officer was not suggesting a two-year order. The Hearing Officer was interested in determining

if a vacancy might occur sometime during the 1990-91 school year, in which case a modified order might be appropriate.

Mr. Babayco also stated in his letter that he had been in contact with Petitioner's mother and advocate regarding the possibility of home teaching in lieu of finding a nonpublic school. However, there was disagreement as to how much teaching time was needed and who would provide the home teaching. Mr. Babayco's suggestion was to provide a home teacher three-to-four hours a week and provide an aide three hours per day who would provide most of the instruction to carry out Bion's goals and objectives. Mr. Babayco also stated the home teacher and aide could be trained by the California Deaf/Blind Services Project to enable them to provide the necessary instruction for Bion.

On October 18, 1990, the Hearing Officer sent a copy of Mr. Babayco's letter of October 8, 1990, to Petitioner's parents and advocate.

No written documents were received from Petitioner as of November 1, 1990, the date of the first telephone conference.

On the occasion of the November 1, 1990, telephone conference, Petitioner's advocate, Ms. Ashly, stated she had contacted Mr. David Eagan, Director of the Foundation for the Junior Blind on October 31, 1990. Mr. Eagan told her that a teacher had just resigned and that when a replacement was hired, they would have a vacancy for Bion in the day class, but there were no vacancies in the residential program, and might not be for as many as

three years. Ms. Ashly stated she now had two possible optional placements for Bion.

Option 1: Utah School for the Deaf/Blind in Ogden, Utah. The school has daily and residential classes and has an opening. The residential placement is Monday through Friday. The school is closed on Saturday and Sunday. Mrs. Jackson has relatives in Ogden and would be willing to move to Ogden where she could take care of Bion on Saturday and Sunday during the school year.

Option 2: Foundation for the Junior blind day class in Los Angeles, California. This placement would involve one of Mrs. Jackson's daughters moving to Los Angeles near the school where Bion would be enrolled in the day class. The daughter would transport Bion to and from school and provide a residence for him on Monday through Thursday nights. Bion would have to be transported to Ojai on Friday afternoons where he would reside with his parents on Friday, Saturday, and Sunday nights, and then be returned to Los Angeles on Monday morning.

No cost estimates had been obtained for providing the services under options 1 or 2, which the School District requested be obtained in order to consider these options.

Mr. Babayco then suggested a third option:

Option 3: A home teaching proposal. This was the most recent program suggested by Mr. Babayco, after his determining there was no state-certified nonpublic school placement available. (Letters dated September 24, 1990, and October 8, 1990) Petitioner's advocate stated that the

District-proposed home school program, Option 3, was not appropriate as Bion would receive less education than when he was last in school.

Mr. Babayco and Ms. Novak stated they would require additional time and information about Options 1 and 2 before making a decision regarding the options. They also requested that the original placement they recommended, Penfield School in Ojai, now identified as Option 4 remain, under consideration.

Petitioner's advocate stated she would obtain cost estimates for Options 1 and 2 and forward them to Respondents and the Hearing Officer by December 1, 1990.

Petitioner and Respondents agreed that an OT evaluation was needed to determine why Bion has ambulatory problems and what, if anything, can be done to improve his capabilities. Bion is a client of the California Children's Services Program, which will be asked by Petitioner to provide the evaluation.

Ms. Ashly informed Respondents and the Hearing Officer that Bion was scheduled for surgery on November 29, 1990, at which time both of his eyes would be removed. He would not be available to receive education services until January 1, 1991.

The Hearing Officer stated he would convene another telephone conference hearing upon receipt of cost and program information.

On November 13, 1990, the Hearing Officer was informed that Respondents had filed an appeal of the August 14, 1990, decision in United States District Court

for the Central District of California. The appeal was filed prior to the administrative aspects of the hearing being concluded. The August 14, 1990, decision by the Hearing Officer contained a statement:

> "The Hearing Officer retains jurisdiction in this case until the nonpublic school is identified and Bion is placed there."[1]

Clearly, Bion had not been placed in a nonpublic school at the time of the District Court filing, and, in fact, Respondents had agreed at the time of the November 1, 1990, telephone hearing to the reconvening of the hearing, via telephone conference. The hearing was to be reconvened when Petitioners' advocate, Ms. Ashly, obtained cost estimates for a possible placement in the Utah School for the Blind and the Foundation for the Junior Blind day class in Los Angeles as requested by the School District. Advocate Ashly was given until December 1, 1990, to obtain the cost estimates and forward them to Respondents and the Hearing Officer.[2]

On December 13, 1990, the Special Education Hearing Office Calendar Clerk received a fax letter from Advocate Ashly, dated December 12, 1990, containing information and cost estimates for a placement in the day class at the Foundation for the Junior Blind. Ms. Ashley also reported that the Utah School for the Deaf/Blind option was no longer available as they would not accept out-of-state placements at this time.

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[1] *Page 15 of the August 14, 1990, decision.*

[2] *On November 28, 1990, Ms. Ashley requested a two-week continuance to December 14, 1990, which was granted to obtain the placement information.*

On December 17, 1990, the Hearing Officer was informed of the receipt of Advocate Ashley's letter, at which time he directed the Calendar Clerk to set up the telephone conference call hearing agreed upon at the time of the November 1, 1990, telephone hearing.

On December 18, 1990, a second telephone conference hearing was held. Those participating in the hearing were Mrs. Jackson, Ms. Ashly, Ms. Novak, Mr. Babayco, and the Hearing Officer.

Mr. Babayco, because of the filing of an appeal in the Federal District Court, was uncertain of his role at this telephone conference hearing. The Hearing Officer stated that no court order prohibiting the hearing had been received and that the Special Education administrative hearing had not been concluded, therefore, the hearing would continue. Mr. Babayco placed his objection in the record, which was acknowledged by the Hearing Officer.

Ms. Ashly again stated that the Utah School for the Blind, Option 1, was not available at this time. Ms. Ashly then reviewed the cost estimates she obtained for placement in the Foundation for the Junior Blind (FJB), pointing out the following salient factors:

1. The Foundation charges $96.25 per school day for day class students. This cost is the same during the extended school year. Ms. Ashly had computed 141 school days, for the remainder of the school year, including the extended school year, for a total of $13,577.25.

2. Caretaker costs were computed as follows: Mrs. Jackson's 24-year-old daughter, Susan, would act as Bion's caretaker during the

school week, charging $5.00 per hour, 7 hours per day (2 hours in the morning and 5 hours in the evening). Ms. Ashley stated that $5.00 per hour was in Petitioner's opinion a fair price for this service. No other information supporting this figure was presented. Susan would get Bion ready for school in the morning and receive him at home at the conclusion of the school day. Cost for 141 days is $4,935.00.

3. Rent compensation was computed at $300.00 per month. Bion would reside at his grandparents' home, which is approximately 20 miles from the FJB school. Both the caretaker, Susan, and Bion would reside at this home from Sunday night to Friday at the conclusion of school. Room space for Bion and Susan would be provided as well as appropriate facilities for their use, e.g., toilet, electricity, gas, water, cooking area. Three-hundred dollars ($300.00) for two persons was deemed to be a fair price by Petitioner. No other evidence was introduced relative to this point, other than a statement by Ms. Ashly that rooms closer to the school would be much more expensive. Cost for 7 months' rent would be $2,100.00.

4. Food costs were computed at $10.00 per day, $5.00 for Bion and $5.00 for the caretaker. Petitioner arrived at this cost by stating it was a fair price for two persons.

5. Transportation mileage was estimated by Petitioner at 65 miles each way, Ojai to Los Angeles, 130 miles round trip. The state rate of 22¢ per mile was used to compute the

transportation cost. 30 round trips or 130 miles x 22¢ = $858.00[3]

6. Ms. Ashly stated that FJB said they *may* need an additional aide to accommodate Bion's special needs. The FJB would not know if this was required until they worked with Bion; however, if determined to be necessary, the aide would be a requirement for Bion to attend school. An additional aide 6 hours per day at $7.00 per hour = $5,992.00.

7. The cost of bus transportation from Bion's proposed Los Angeles residence at his grandparents to the FJB school was not estimated. According to Ms. Ashly, a transportation contract between the FJB and the Los Angeles Unified School District would have to be arranged. Ms. Ashly was unable to obtain this information in time for this hearing.

8. The total estimate of costs submitted by Petitioner for placing Bion at the FJB for the remainder of the school year was $28,802.25, *plus the unknown bus transportation cost.*[4]

At the conclusion of advocate Ashly's review of the estimated costs to place Bion at FJB the Hearing Officer and Ms. Novak raised the issue of whether or not Bion is

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[3] *Ms. Novak estimated the distance from Ojai to Los Angeles is 85 miles, not 65. If Ms. Novak is correct, the cost would be 60 x 85 x 22¢ = $1,122.00.*

[4] *While not generally relevant to deciding the issue of placement and services for Bion, cost estimates were obtained to enable the Hearing Officer to evaluate the request for compensation for services provided by Bion's immediate family and to enable the School District to consider alternative cost saving measures.*

now receiving funds from a federal, state or county agency which could be used to offset some of the cost for Bion's caretaker, residence and food for the five days he would reside in Los Angeles. Ms. Jackson stated she received money from Alameda County for adopted child care. When questioned as to what the funds could be used for, Ms. Jackson stated they were unrestricted and discretionary funds; however, she could not point out the law which so stated. Ms. Ashly stated she would obtain a copy of the law involved and ascertain the amount of the subsidy and forward this information to the Hearing Officer as soon as possible.

Ms. Ashly stated she would also try to obtain a cost estimate for the transportation of Bion from his proposed Los Angeles residence to the FJB.

Mr. Babayco then raised the question of whether special education funds could be used to pay for items such as caretakers, rent and food.

Ms. Ashly stated that it would cost the District approximately $33,000.00 per year, plus extended year costs if Bion had been able to enroll in the FJB residential program and that Petitioner's proposal for the FJB day class was very reasonable in that it included some transportation costs.

The Hearing Officer questioned Mr. Babayco as to whether FJB was a state-certified nonpublic school, and he responded it was. Mr. Babayco also stated FJB had a credentialed deaf/blind instructor, however, other teachers had severely handicapped credentials for deaf or blind, similar to what the District offered at Penfield School. He also stated the District was willing to provide

an additional aide at Penfield School. The Hearing Officer pointed out that Penfield School had been found to be an inappropriate placement in the August 14, 1990, decision, hence the order for a nonpublic placement.

Regarding the FJB placement as being an appropriate placement, in Mr. Babayco's letter to the Hearing Officer dated September 24, 1990, he stated he had contacted leading experts in the California State Department of Special Education, including Mr. Paul Starkovich, State Consultant for Nonpublic Schools; Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services; and Ms. Susan White, Lead Educational Specialist, California Blind Services-Southern California, and they all had referred him to FJB as a possible placement for Bion.

It has been established to the satisfaction of the Hearing Officer that the FJB is an appropriate certified nonpublic school which can meet Bion's current needs in a safe environment, as stated in the August 14, 1990, decision.

The question of using special education funds to pay for caretaking, rent compensation and food is a separate issue which is addressed here.

In this case, if Bion is placed in the day class at FJB, transportation to Ojai and return each day would *increase* the time he is on a transportation vehicle compared to his original Boswell School placement. Bion's physician, Dr. Fran Larsen, has testified that for medical reasons he objected to the two hours per day Bion was in the transportation vehicle while attending Boswell School. Depending upon the correct distance between Ojai and

FJB, 65 or 85 miles, daily transportation to and from Los Angeles would substantially increase daily transportation time, which the Hearing Officer finds unacceptable.

Absent daily transportation from Ojai to the FJB, Bion must reside in Los Angeles, preferably near the FJB. Bion's grandparents live about 20 miles from the FJB, they have offered Bion and Susan, his caretaker, lodging and use of facilities for $300.00 per month, which appears reasonable considering general rent costs in Los Angeles.

Food costs of $5.00 per day for Bion appears to be for three meals per day which is very reasonable. The caretaker's meals should not be paid for from Special Education funds as the caretaker would have to eat, whether or not she was taking care of Bion, and is receiving caretaker compensation.

Transportation to Los Angeles from Ojai and return at a rate of 22¢ per mile is very reasonable. These particular trips would occur on weekends. Bion would leave Los Angeles on Friday evening and return on Sunday evening. With reference to daily transportation costs, Petitioner's advocate Ms. Ashly indicated in a letter dated December 19, 1990, that the A.P.T. Company will transport Bion from his Los Angeles residence to the Foundation for the Junior Blind and return him for $39.82 per day x 141 school days = $5,614.62 school year.[5]

In order for Bion to receive a free appropriate education, he will have to attend JFB as it is the *only* school identified which will meet his low incident needs, given

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[5] *Adding this sum to the previously estimated total cost of $28,802.25, (page 6) results in a new estimated total of $34,416.87.*

that the Penfield School has been found inappropriate and no other appropriate options were identified. The only opening in JFB at the present time is the five-day nonresidential program. Bion cannot be transported from Ojai to JFB on a daily basis for medical reasons. In order to receive a free appropriate education, Bion must reside in Los Angeles. Bion's parents have ten other children, some or all of whom are handicapped. It does not appear to be feasible for his parents to reside with Bion. The entire family, with possibly the exception of Mr. Jackson, would have to move to Los Angeles and find local housing. The aforementioned move would be at great expense to Petitioner's parents, if at all possible.

On December 19, 1990, the Hearing Officer received a copy of a letter by facsimile, of the same date, in which advocate Ashly provided information regarding the Aid to Adopted Parents Financial Assistance Program. This document was made a part of the record in this case.

Item #2 of the aforementioned document states that, "the financial assistance is for the child's needs above room and board."

Item #5 states, "the financial assistance is not intended for board and care costs at another facility providing services to the child."

Advocate Ashly's letter refers to California Administrative Code, Title 22, Division 2, Chapter 3, Subchapter 2, Article 7, Sections 30667, 30669, and 30671 as the authority for establishment of the funds.

The following U.S. Code section references from the Education of the Handicapped Act are applicable to this case.

20 U.S.C. Section 1400(c), which states:

> Purpose. It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) [20 USCS § 1412(2)(B)], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. Section 1401(a)(18), which states:

(18) The term "free appropriate public education" means special education and related services that –

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS § 1414(a)(5)].

The following Code of Federal Regulations sections are applicable in this case.

34 CFR 300.13(b)(13) states:

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

34 CFR 300.302 states:

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

Petitioner has identified a solution to the residence problem by having Bion's sister move in with Bion's grandparents to act as Bion's caretaker and pay a nominal rental fee for the period of time the home is in use. Neither the sister nor the grandparents are required to provide this service as they are not legally responsible for Bion; therefore, reasonable compensation is justified which will then enable Bion to receive a free appropriate education.

It would logically follow that where Petitioner has identified the *only* appropriate program available to him,

cannot be admitted to the residential program because it is at capacity at the present time, and *can* enroll in an appropriate nonresident program at the same school, to deny him the reasonable rent compensation, food and caretaker fees which would enable him to attend school would deny him equal treatment from other handicapped children who are placed in the residential program. A distinction might be made if there were no nonresidential, appropriate program available; however, in Bion's case this is not so. Whether Bion spends the night at FJB (the residential program) or at his grandparents (the nonresidential program) should not affect his ability to receive the free approproate education to which he is entitled.

ORDER

The Ojai Unified School District and the Ventura County Superintendent of Schools are to enroll Bion in the California Foundation for the Junior Blind in Los Angeles day class for the period beginning January 7, 1991. Respondents shall pay school enrollment and tuition fees, transportation from Bion's Los Angeles residence to the Foundation for the Junior Blind and return each day. Respondent shall also reimburse Petitioner for one round trip per school week between Ojai and Los Angeles, caretaker fees at $35.00 per school day, rent compensation at $300.00 per month/or fraction thereof, and food costs for Bion at $5.00 per day. Reimbursement due Bion's grandparents for rent, and his caretaker's fees, and mileage allowance shall be paid once per month. In the event that an additional school aide is needed for Bion, that cost will be borne by the Respondents.

Within 15 days Bion's IEP will be amended to conform with this order.

This order is effective only until the end of the 1990-91 school year, including the extended school year.

Dated: January 2, 1991

/s/ Raymond Brown
Raymond Brown
Hearing Officer

APPENDIX C

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Attorneys for Defendants BION JACKSON, ELIZABETH JACKSON and RICHARD JACKSON

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

OJAI UNIFIED SCHOOL DISTRICT AND VENTURA COUNTY SUPERINTENDENT OF SCHOOLS, Plaintiffs, VS. THE CALIFORNIA SPECIAL EDUCATION HEARING OFFICE (CENTER FOR ADMINISTRATIVE JUSTICE – McGEORGE SCHOOL OF LAW); RAYMOND C. BROWN, HEARING OFFICER; CALIFORNIA STATE DEPARTMENT OF EDUCATION; BILL HONIG, in his official capacity as STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF CALIFORNIA; BION JACKSON a minor; ELIZABETH JACKSON; RICHARD JACKSON, Defendants.	CIVIL ACTION NO. 90 4915 R **DEFENDANT JACKSONS' OBJECTIONS TO PLAINTIFF'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW** (Local Rule 14.6) (Filed Sept. 23, 1991)

Pursuant to Local Rule 14.6 defendants Bion Jackson, a minor, Elizabeth Jackson and Richard Jackson hereby state the following objections to the Proposed Statement of Uncontroverted Facts and Conclusions of Law which was prepared by plaintiffs following the granting of summary judgment on September 3, 1991.

OBJECTIONS TO PROPOSED STATEMENT OF MATERIAL FACTS:

(1) Plaintiff's Material Facts 2 and 3:

As to plaintiff material facts 2 and 3 defendants object on the grounds that the description of Bion Jackson's disability contained in plaintiff's material facts 2 and 3 is incomplete and not reasonably based upon the record herein. An accurate description of Bion Jackson's disabilities would include the following:

1. Bion Jackson is an 11 year old, severely disabled male, who is considered to have no vision or hearing as a result of rubella syndrome. (AHD of August 14, 1990, pages 3-4; Exhibit 1 to plaintiff's complaint; Letter of June 6, 1989, Dr. Fran Larsen, Exhibit A to AHT). Bion is lacking in any residual use of both vision and hearing. He is extremely limited in his ability to physically assess the environment. His experiences are limited to what is brought directly to him or what he is directly exposed to. Bion needs activities that are functional and meaningful to his immediate needs and capabilities. Because of Bion's sensory losses, tactual and kinesthetic communication appear to be the only modes of communication that have meaning to Bion. Since educators or caregivers are required to be in physical contact, one-to-one teaching

should be highly stressed. This approach could be best implemented within a program specifically designed for deaf/blind students. (1990 California School for the Blind assessment, AHT Exhibit 65; AHD August 14, 1990 page 9).

(2) Plaintiff's Material Fact No. 7:

Defendants object to material fact No. 7 on the ground that it erroneously states that Bion is functioning far below his chronological age. This is inconsistent with Bion's apparent ability to attempt and function in a swim tank, (AHT, Vol. IV, page 141, lines 17-28 and page 142, lines 1-12). It is also inconsistent with the testimony of Dave Gransee at the administrative hearing, that, in his opinion, Bion had the cognitive ability to learn sign language. (AHT Vol. II, p. 14, line 9)

(3) Plaintiff's Material Fact No. 9:

Defendants object to material fact No. 9 on the ground that it is misleading and appears to be false. Material fact No. 9 states that Saroulta Dala is an experienced and credentialed teacher. There is no cited testimony or evidence that supports any "special education" credentialed status, and Ms. Dala does not have a special education credential to teach either the blind or the deaf as is required by California Education Code § 44265.5. (AHD p.14).

(4) Plaintiff's Material Facts No. 17 and 20:

Defendants object to material facts No. 17 and 20 on the ground that said "facts" are misleading and incomplete. As to the reference to the California School for the Blind assessments a complete and accurate statement of

the California School for the Blind assessment would include the following as was stated by the Administrative Hearing Officer:

> "The two CSFB assessments reveal that, after seven years in the public school system in Ventura County, Bion still does not have a language, is not toilet trained, cannot feed himself, cannot walk, and has developed very few self-help skills. These facts exist despite the diligent efforts of school district staff to educate Bion." (AHD, August 14, 1990, page 12)

As to Material Fact 20, a complete statement of the Hearing Officer's conclusion is as follows:

> "In his school district placements, Bion has not benefitted educationally because he had not made satisfactory progress towards his IEP goals and objectives. The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit." (AHD, August 14, 1990 page 12).

(5) Plaintiff's Material Fact No. 21:

Defendants object to plaintiff's material fact No. 21 on the ground that it is incomplete and misleading and purposefully taken out of context of the administrative hearing decision of August 14, 1990. An accurate statement of the Hearing Officer's decision would include the following: "The due process hearing did not produce sufficient evidence to make a determination that the

Foundation for the Junior Blind (FJB) is an appropriate placement for Bion. It may well be an appropriate placement; however, the school district will have to determine if the FJB program can address the goals and objectives outlined in Bion's IEP of May 31, 1989, has the appropriate credentialed staff, has facilities which meet state and federal requirements, and has a place for Bion. (California Education Code 56366) Additionally, if the FJB is the appropriate placement, Bion should be in residence at least five days per week as transportation to and from Ojai each day would not meet his medical needs as described in Exhibit B and by Dr. Larsen" (AHD, August 14, 1990. page 15)

(6) Plaintiff's Material Fact No. 22:

Defendants object to plaintiffs material fact No. 22 on the ground that it is misleading, false and does not accurately represent the facts in this case. The decision of August 14, 1990 ordered as follows:

> "Within 45 days from the date of this order, the Ventura County Superintendent of Schools and the Ojai Unified School District are to identify a state certified non-public school which can provide Bion with an appropriate program in a safe environment and to place Bion in that school." (AHD August 14, 1990, page 15)

In response to this order the school district contacted the Foundation for the Junior Blind (FJB) and were told by the FJB that no space was available for Bion in the residential program. It was later discovered that Bion could be accepted to the FJB in the day program in Los Angeles on a temporary basis until such time when Bion could be

admitted to the residential program. (Marty Babayco Letter dated September 24, 1990; AHD January 2, 1991 page 10-11)

Plaintiff's Material Fact No. 22 misrepresents the facts in this case. As of September 24, 1990, according to a letter written by Mr. Marty Babayco, Director of Special Education, the school district (Mr. Babayco) had received no less than three recommendations to the FJB as being the only program in the State of California which could meet Bion's educational needs. (Marty Babayco letter dated September 24, 1990). After consideration of Mr. Babayco's correspondence and correspondence from Coleen Ashly, Advocacy Specialist for the Jacksons, the Hearing Officer ordered placement of Bion Jackson in the FJB day program. (AHD January 2, 1991).

(7) Plaintiff's Material Facts No. 23, 24 and 25:

Defendants object to plaintiff's material facts No. 23, 24 and 25 on the following grounds. Due to the fact that the plaintiff school districts claimed inability to comply with the hearing officer's order of August 14, 1990, subsequent hearings by way of telephonic communication were necessary and were held in order to locate an appropriate placement for Bion Jackson in view of the fact the Hearing Officer determined Penfield School was not an appropriate placement for Bion. Plaintiffs claim that these telephone conferences held November 1, 1990 and December 18, 1990 were not part of the administrative hearing record. However, volume 6, page 1, line 2, Raymond Brown as hearing officer clearly specifies that the telephone conference was "a continuation of a hearing" and no objections were made by either party at that time.

At line 7, Mr. Brown also stated that the telephone conference was to "consider modification of a decision". Plaintiff's characterization of these telephone conversations as not part of the administrative hearing process is clearly incorrect, and contrary to the record.

(8) Plaintiff's Material Fact No. 27:

Defendants object to plaintiff's material fact No. 27 on the ground that it is incomplete and misleading. The January 2, 1991 "Supplemental order" states:

> "The Ojai Unified School District and the Ventura County Superintendent of Schools are to enroll Bion in the California Foundation for the Junior Blind in Los Angeles day class for the period beginning January 7, 1991. Respondents shall pay school enrollment and tuition fees, transportation from Bion's Los Angeles residence to the Foundation for the Junior Blind and return each day. Respondent shall also reimburse Petitioner for one round trip per school week between Ojai and Los Angeles, caretaker fees at $35.00 per school day, rent compensation at $300.00 per month/or fraction thereof, and food costs for Bion at $5.00 per day. Reimbursement due Bion's grandparents for rent, and his caretaker's fees, and mileage allowance shall be paid once per month. In the event that an additional school aide is needed for Bion, that cost will be borne by Respondents." (AHD January 2, 1991 page 11)

(9) Plaintiff's Material Fact No. 28:

Defendants object to plaintiff's material fact No. 28 on the ground that said "fact" is disputed, conclusionary and not supported by any fair reading of the evidence in

this matter. The factual assertion that the designated instructional services are adequate for Bion's needs is clearly in dispute. The hearing officer determined after considering the evidence presented on both sides, that the Penfield School program was insufficient and could not provide the minimum educational requirements required by Federal and State law. (AHD p.14). The hearing officer reviewed each of Bion's Individual Education Plans (IEP) as well as the two California School for the Blind assessments of Bion in making his determination of Bion's educational needs and the appropriateness of FJB as an educational program for Bion, as distinguished from retaining Bion in a Penfield School Placement. (AHD, August 14, 1990, page 13-14). The reference to DeAnza School is entirely improper in view of the fact that the DeAnza School was not in issue in the Administrative Hearing Proceedings below. Any reference to DeAnza is an improper extension of the scope of review in this matter which should be limited to the issues presented at the Administrative Hearing level.

(10) Plaintiff's Material Facts No. 29 and 30:

Defendants object to plaintiff's material facts No. 29 and 30 on the grounds that such assertion of fact is contrary to the Hearing Officer's determination which was reached after lengthy administrative hearings on the issue. Any references to DeAnza are improper in that such reference improperly extends the scope of review of this matter beyond the scope of the administrative hearing. As to the "appropriateness" of Penfield School the Hearing Officer held:

> "The evidence does not establish that Penfield School is a placement which will enable Bion to make this necessary progress. Therefore, the Hearing Officer finds that Penfield School is not an appropriate placement for Bion because his placement there would not meet the minimum requirements described in *Rowley* with regard to educational benefit." (AHD August 14, 1990, page 14)

As to references to the declarations of Marty Babayco, Diana Novak and the IEP dated June 3, 1991, defendants incorporate the objections thereto which were filed with the District Court as DEFENDANTS JACKSON MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO DECLARATIONS OF BABAYCO AND NOVAK AND EXHIBIT 1 TO NOVAK'S DECLARATION IN CONNECTION WITH PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

OBJECTIONS TO PROPOSED CONCLUSIONS OF LAW:

(11) Plaintiff's Conclusion of Law No. 1:

Defendants object to Plaintiff's Conclusion of Law No. 3 on the ground that it contains an inaccurate statement of the law in regard to the standard of review in cases under the Individuals With Disabilities Education Act (IDEA). Section 1415(e)(2) of the IDEA was interpreted as to the standard of review by the United States Supreme Court in *Hendrick Hudson Bd. of Ed. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Here the Court rendered the seminal decision on the

scope of judicial review under the Education of Handicapped Act now referred to as the (IDEA). *Rowely* (supra) rejected the argument that section 1415(e)(2) gives district courts broad powers to overturn decisions regarding the selection of programs for the handicapped. Plaintiffs base federal district court review of this matter on 20 U.S.C. § 1415(e)(2) which states in pertinent part:

> " . . . the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (20 U.S.C. § 1415(e)(2)

The United States Court of Appeals in *Town of Burlington v. Department of Educ., Com. of Mass.*, 736 F.2d 773 (1st Cir. 1984) Affirmed 471 U.S. 359 (1985) defined the standard of review for the district court in cases under the Act. The court stated:

> "We believe that the key to the review authorized by the Act lies in the additional evidence clause. We construe "additonal" in the ordinary sense of the word, *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980), to mean supplemental. Thus construed, this clause **does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony**; this would be entirely inconsistent with the usual meaning of 'additional'. We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. (citation)" (736 F.2d at p. 7909) (emphasis added)

The holding in *Burlington* (supra) is further supported by subsequent cases on the issue. In *Roland M. v. Concord School Committee* 910 F.2d 983 (1st Cir. 1990) the court ruled that in review of individualized education program (I.E.P.) under the Act, the district court did not abuse its discretion in refusing to allow testimony of parent's expert witnesses who had not testified in the administrative hearing process even though they had been given every opportunity to present the desired testimony at the administrative level.

(12) Plaintiff's Conclusions of Law No. 4 and 5:

Defendants object to plaintiff's conclusions of law No. 4 and 5 on the ground that said conclusions of law do not represent an accurate statement of the law in regard to the standard of review under the Act (IDEA). Proceedings under section 1415 are to be in the nature of review rather than trial *de novo. David D. v. Dartmouth School Committee*, 775 F.2d 411, 424 (1st Cir. 1985), *cert. denied* 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986). This rule requiring a "limited review" in cases under 20 U.S.C. § 1415(e) was explicitly set forth by the Supreme Court in *Rowley* (supra), the seminal decision on the scope of judicial review under the Act. According to the Court in *Rowley* (supra) a court can ask only: (1) whether the State has complied with procedures set forth in the Act, and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefits. (See *Rowley* 102 S.Ct. at 3051) The Court concluded in saying, "If these requirements are met the State has complied with the obligations imposed by Congress and the courts can require no more." (See *Rowley* 102 S.Ct. at 3051)

(13) Plaintiff's Conclusion of Law No. 8:

Defendants object to plaintiff's conclusion of law No. 8 on the ground that said "Conclusion of Law" is nothing more than an argumentative unsupported conclusion which is not based upon any evidence which was before the court. The only additional evidence upon which plaintiffs could rely, in formulating such conclusions, are the declarations of Diana Novak and Marty Babayco and IEP dated June 3, 1991. These items should not have been considered because such evidence constitutes improper "embellishments" of the administrative record and as such are beyond the scope of review in these types of cases under the Act. (See *Town of Burlington v. Department of Educ., Com. of Mass.*, 736 F.2d 773 (1st Cir.1984) Affirmed 471 U.S. 359 (1985) Additionally said declarations were subject to the evidentiary objections heretofore filed with the court on August 23, 1991.

(14) Plaintiff's Conclusion of Law No. 9:

Defendants object to plaintiff's conclusion of law No. 9 on the ground that said "Conclusion of Law" is also nothing more than an argumentative unsupported conclusion which is not based upon any evidence which was before the court. The Hearing Officer's decision as to the appropriateness of the FJB was supported by a preponderance of the evidence. It was only after the Hearing Officer determined that Penfield School could not provide Bion with an "appropriate education" that he ordered the School District to locate an appropriate placement for Bion. In an attempt to locate an appropriate placement for Bion Jackson per the August 14, 1990

administrative order, Marty Babayco, as Director of Special Education for the Ojai Unified School District, undertook exhaustive attempts to locate an appropriate educational facility equipped to provide for Bion's educational needs. In a letter dated September 24, 1990 from Mr. Babayco to Raymond Brown as Hearing Officer, (said letter was attached to Administrative Hearing Pleadings and Correspondence and made a part of the record herein) Mr. Babayco indicated that the first institution which he contacted in his attempt to locate an appropriate placement was the Foundation for the Junior Blind. The September 24, 1990 letter lists the numerous recommendations to the Foundation for the Junior Blind which were received by Mr. Babayco. The following individuals recommended the FJB as a proper placement for Bion Jackson: (1) Mr. Paul Starkovich, State Consultant for Non-public Schools referred Mr. Babayco to the FJB, stating that the FJB was the only non-public school with the type of services that could possibly serve Bion's needs. (September 24, 1990 letter, paragraph 3), (2) Mr. Steve Johnson, State Consultant, Director of California Deaf/Blind Services also recommended the FJB for Bion. (September 24, 1990 letter, paragraph 4), (3) Ms. Susan White, Lead Educational Specialist, California Deaf/Blind Services – Southern California also suggested the FJB as an appropriate placement for Bion. (September 24, 1990 letter paragraph 5).

(15) Plaintiff's Conclusion of Law No. 10:

Defendants object to plaintiff's conclusion of law No. 10 on the ground that said conclusion is not supported by the evidence in this case and is not an accurate representation of the law pertaining to "related services" under 20

U.S.C. § 1401(1) (Supp.III 1985). The term "related services" is defined by the Act as follows:

> "(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (20 U.S.C. § 1401(17)

In determining what is or is not a "related service", the court in *Clovis Unified v. Office of Administrative Hearings,* 903 F.2d 635 (9th Cir. 1990) held that this analysis must focus on whether the expense is necessary for educational purposes. (See 903 F.2d at p. 643) In the instant case, the Hearing Officer ordered the payment of Rent, Caretaker and Food Costs because it was necessary for Bion Jackson to relocate to the Los Angeles area in order to allow him to attend the FJB day program. This order was temporary until Bion could be accepted in the 24 hours residential program offered by the FJB. In *Jefferson County Bd. of Educ. v. Breen,* (supra) the 11th Circuit Court of Appeals affirmed the lower district courts finding that the board of education pay to the parents of a handicapped child, all out-of-pocket expenses incurred in placing their child in a treatment center which was ultimately determined to be an appropriate placement. (See 853 F.2d at p. 857) The court in *Clevenger v. Oak Ridge School Bd.,* 744 F.2d 514 (6th Cir.1984) stated:

> "Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an "appropriate" education. When only one is appropriate, then there is no choice." (744 F.2d at p. 517)

With these cases in mind, the administrative hearings held in this matter determined after hearing evidence on both sides that only one placement was appropriate for Bion, said placement being the FJB. In order to effectuate Bion's placement at the FJB, it was deemed necessary to temporarily incur the above referenced costs in order to effectuate the intent of the Act until such time when Bion could be admitted into the residential program.

(16) Plaintiff's Conclusions of Law No. 11 and 12:

Defendants object to plaintiff's conclusions of law No. 11 and 12 on the grounds that said conclusions are not supported by the evidence presented in this case and inaccurately represent the law on this issue. As in (15) above, defendants maintain that the expenditure of the types of costs listed in plaintiff's conclusion of law No. 11 and 12 are to be classified as "related services" under 20 U.S.C. § 1401(1) (Supp.III 1985). The Hearing Officer determined that such expenditures were necessary to provide Bion Jackson with an appropriate education at the FJB program located in Los Angeles California. Such determination was not made until after the Hearing Officer had also found that Penfield School was not an appropriate placement for Bion. In *Kattan v. District of Columbia*, 691 F. Supp. 1539 (DDC 1988) the court held that parents could receive cost of placement because their independent placement was appropriate and school's was not.

One gets the impression that the sole reason for plaintiff's objection to the payment of these types of related services is cost and budgetary considerations. The court in *Clevenger* (supra) held that cost considerations are not relevant when $88,000 per year residential placement is only appropriate program for seriously emotionally disturbed child. The evidence presented at the administrative hearing and on summary judgement in this matter amply demonstrates that the FJB was the only appropriate placement for Bion Jackson.

(17) Plaintiff's Conclusion of Law No. 13:

Defendants object to plaintiff's conclusion of law No. 13 on the ground that said conclusion pertaining to procedural compliance is vague and ambiguous in that the meaning of "procedural requirements of the IDEA" is not defined. In addition, said "compliance" is not supported by either the evidence presented in this case or the administrative hearing determination which found Penfield School was an inappropriate educational environment for Bion.

(18) Plaintiff's Conclusion of Law No. 14:

Defendants object to plaintiff's conclusion of law No. 14 on the ground that said conclusion is ambiguous in that one cannot determine which IEP plaintiffs are referring to in conclusion of law No. 14. The Hearing Officer determined after hearing ample evidence presented from both plaintiffs and defendants that:

> "In his school district placements, Bion has not benefitted educationally because he has not made satisfactory progress towards his IEP goals and objectives. The evidence does not

establish that Penfield School is a placement which will enable Bion to make this necessary progress." (AHD p. 14)

Plaintiff's conclusion of law No. 14 is also irrelevant and immaterial. Even if Bion's IEPs were reasonably calculated to enable him to receive educational benefits, the school district (Penfield School), as determined by the Hearing Officer, was not the educational placement wherein Bion could achieve his IEP goals.

CONCLUSION:

Defendants object to the form of plaintiff's proposed statement of uncontroverted facts and conclusions of law pursuant to Local Rule 14.6. Said objections are made in good faith and with the intent to correct the inaccuracies and misstatements in said statement of material facts and conclusions of law.

DATED: September 19, 1991.

Respectfully submitted,

ELLISON, HINKLE & BAYER

By /s/ David R. Ellison
DAVID R. ELLISON
Attorneys for Defendants,
Bion Jackson, a minor,
Elizabeth Jackson and
Richard Jackson

PROOF OF MAILING

STATE OF CALIFORNIA)
) ss
COUNTY OF VENTURA)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 5550 Telegraph Road, Post Office Box 6130, Ventura, California 93006.

On the date shown below, I served the within DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND STATEMENT OF CONCLUSIONS OF LAW on the interested parties by causing true copies thereof to be put in sealed envelopes addressed as follows:

Sharon A. Watt
Filarsky & Watt
1835 Knoll Drive
Ventura, California 93003

Barry Zolotar
Deputy General Counsel
California Dept. of Ed.
P.O. Box 944272
Sacramento, CA 94244-2720

I caused such envelope to be deposited in the mail at Ventura, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on the same day in the ordinary course of business. I am

aware that on motion of any party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 19, 1991, at Ventura, California.

/s/ Jeffrey D. Johnsen
JEFFREY D. JOHNSEN